

LETTERS ON  
IMPERIAL RELATIONS  
INDIAN REFORM  
CONSTITUTIONAL AND  
INTERNATIONAL LAW  
1916-1935

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IMPERIAL RELATIONS  
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INTERNATIONAL LAW  
1916—1935

BY

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*IN MEMORIAM*  
MARGARET BALFOUR KEITH



## PREFACE

THESE Letters were written for the most part at the suggestion of my wife; in all cases their contents formed the subject of discussion between us, and they were approved by her in the final form. Copies of them were preserved by her with the intention of publishing them after my death. In no part of my work did she take a greater interest, and I publish them now in her memory as some slight acknowledgement of twenty-one years of constant help.

During my service in the Dominions Department of the Colonial Office, and as Assistant Secretary to the Imperial Conference, I came to recognize that after sixty years the time had arrived when the formula devised by the practical sagacity of Lord Durham no longer sufficed to define the system of Imperial relations, and when a system must be devised under which the Dominions should assume control over the conduct of foreign affairs to the same extent as they exercised authority over internal matters. The solution favoured by a strong body of contemporary opinion was the creation of a true federal system, but this, I was satisfied, for reasons explained in my *Imperial Unity and the Dominions* (1916), was negated by the strength of the Dominion feeling for autonomy. It was, therefore, inevitable that the Constitution of the Empire should be remoulded in such a manner as to grant to each of the great Dominions external sovereignty without, if possible, destroying in the process the unity of the Crown. Even before the war of 1914-18 practical considerations had compelled for the Radiotelegraphy and Safety of Life at Sea Conferences a striking innovation in the representation for international purposes of the Crown by distinct sets of delegates, and the way had been made ready for the concession of Sir R. Borden's epoch-making demand for the separate representation of the Dominions at the Peace Conference. This led to the decisive step of granting the Dominions membership of

the League of Nations, and within the League international status.

It was the aim of these Letters to indicate as they arose the different problems involved in the changes in Imperial organization. A fundamental difficulty in the process of evolution has been presented by the fact that the Irish Free State since its creation has never acquiesced in the doctrine of the unity of the Crown, and has from the first worked steadily towards the attainment of Republican status, while the United Kingdom is not yet prepared to find a place for a Republic within the British Commonwealth. Some support for Irish claims has been lent by the Union of South Africa, to whose Prime Minister we owe the doctrines of the divisibility of the Crown, the right of neutrality, and the right of secession. Under the influence of such ideals strange forms have been assumed by principles themselves of general acceptability. When the Imperial Conference of 1926 assimilated the position of the Governor-General to that of the King, it hardly realized that the Conference of 1930 would hold it a logical necessity to make over the appointment of the Governor-General to the Dominion Ministry of the day, still less that the Dominion Ministry could claim the right at pleasure to dismiss the Governor-General. It may be doubted if the Conference of 1926, which coupled equality of status with diversity of function, contemplated as a logical consequence the complete elimination of the British Foreign Office from the conduct of foreign affairs by the Free State and the Union. Even the Statute of Westminster, 1931, has proved a bone of contention, for the British Government denies, and the Irish Government asserts, that it gave the latter full licence to abolish the appeal to the Privy Council. The difficulties, of course, have arisen from the adoption by the Conferences of 1926 and 1930 of vague formulae and their anxiety to avoid definite confrontation of dissentient views.

Difficult as are the problems affecting the Dominions, their interest is rather theoretical than practical. In India a prema-

ture promise of Dominion status has resulted in an attempt to devise a constitution which shall at one and the same time grant responsible government to Indians, and yet retain for the British Government effective powers of control. The two aims are contradictory, as my service in 1919 on the committee on the Home Administration of Indian Affairs proved to me; but a solution is sought in the association in the Central Legislature and Government of nominees of Indian autocratic rulers with representatives elected from British India. It seems inevitable that either responsibility will be rendered unreal or that the safeguards will fail, and it is especially unfortunate that the original scheme of protecting British commercial interests by an agreement with India should have been discarded in favour of legislative restrictions of Indian authority which may seriously hamper legitimate development of Indian economic power.

In an Empire which now presents the form of a number of autonomous sovereignties the necessity of a tribunal of permanent character to determine issues arising between the members, which involve matters justiciable in character, appears to be incontestable, and the United Kingdom and the other parts of the Empire are, in principle, as signatories of the Optional Clause of the Statute of the Permanent Court of International Justice, in favour of judicial settlement of disputes. It has, however, proved impossible to secure agreement on anything of greater value than the mere possibility of reference to a tribunal *ad hoc*, and even this shadowy expedient has still to be tried in practice. Nothing perhaps is more significant of the utter incoherence of the present situation than that in 1934 all the Dominion Governments concerned save that of the Union should have reasserted the right of the British Government to disallow legislation impairing the rights of holders of Dominion stocks admitted to trustee status in the United Kingdom, and that the Union Government, despite its assertion of absolute sovereignty, should have undertaken to alter or repeal any legislation of this character

at the bidding of the United Kingdom. So artificial a situation, and one so incompatible with Dominion status, cannot well endure, and investors will sooner or later in their own interests have to seek more practicable safeguards or to recognize that none are possible.

My sincere acknowledgements are due to the Editors of *The Scotsman*, *The Times*, the *Morning Post*, the *Manchester Guardian*, and the *Glasgow Herald* for their courtesy in assenting to the inclusion in this collection of the communications which appeared in their papers.

A. BERRIEDALE KEITH.

UNIVERSITY OF EDINBURGH,

*Jan. 1, 1935.*

PS.—I have added as an epilogue some letters, written while this work was in the press, which deal with the outstanding problems of Dominion status.

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# I

## IMPERIAL RELATIONS



## 1. THE IMPERIAL GOVERNMENT AND THE DOMINIONS

*To the Editor of THE SCOTSMAN, 13 May 1916.*

In your interesting discussion in *The Scotsman* of to-day of 'The Problem of the Commonwealth' you concede to Mr. Fisher's complaint of the lack of control of Dominion Governments over Imperial policy the element of truth that 'outside the Committee of Imperial Defence, to which Dominion Ministers have been invited and which they have attended, and with whose deliberations it is believed they are in more or less intimate touch, there is no regular channel of communication'. May I point out that this statement of the position does something less than justice to the efforts made by the Imperial Governments to induce the self-governing Dominions to interest themselves in Imperial policy, and to the actual steps taken by Canada, the Dominion *par excellence*, to avail herself of the offers of the Imperial Government?

When Sir R. Borden was in England in 1912 he arrived at an arrangement with the Imperial Government under which a Minister of the Dominion Government should reside in London for the purpose not merely of keeping in touch with the Committee of Imperial Defence, but also of having free and full access to the Prime Minister and the Secretaries of State for Foreign and Colonial Affairs for information on all questions of Imperial policy. After some delay this arrangement was given effect to by the appointment of Sir George Perley, who, unlike Lord Strathcona, is a member of the Dominion Cabinet, and who has therefore served throughout the war as an admirable means of keeping the Government of the United Kingdom and that of the Dominion in harmony. The same offer of welcoming a resident Minister and giving him full information was made by Mr. Harcourt to the other self-governing Dominions in a dispatch of the 10th December 1912; unfortunately, it has up to the present time not been

acted upon by any of these Governments, for reasons no doubt of importance, but perhaps not conclusive. The position of Mr. Fisher as High Commissioner for the Commonwealth is that not of a Minister, but of a civil servant; it is, however, possible that it may be the intention of the Commonwealth Government to utilize his services in much the same way as has been done in Canada in the case of Sir George Perley.

In the whole circumstances it appears to me that, without a complete constitutional change in the position of the United Kingdom and the Dominions, for which, like yourself, I doubt if the time is yet ripe, the Imperial Government cannot be blamed for any failure to seek the interest of the self-governing Dominions in Imperial policy generally.

## 2. IMPERIAL FEDERATION

*To the Editor of THE SCOTSMAN, 24 July 1916.*

At a time when questions of Imperial reorganization are of special interest, it may be of value to indicate some of the fundamental difficulties which must be met by any scheme of Imperial federation. It seems sometimes to be forgotten that a very definite scheme of Imperial federation for defence purposes only was proposed by Sir Joseph Ward at the Imperial Conference of 1911, and that it was rejected decisively by Mr. Asquith, Sir Wilfrid Laurier, Mr. Fisher, General Botha, and Sir Edward Morris, and that the rejection was really based on the ground that it was not necessary to secure co-operation for defence purposes, while it would affect the principle of local autonomy, which was the life-blood of the Empire.

It is now contended that the war has completely altered the position, and that Imperial federation is now essential for the maintenance of the Empire, and its effective action in support of the peace of the world. It is clearly impossible to accept this view in the sense that only by the creation of a Central Legislature and Government can effective arrangements be made

for combined action in war and in preparation for war; the history of the past ten years has shown that the Dominions are prepared to take such measures for organization as are required from time to time, and the actual events of the war have shown their readiness and ability to help. The argument, therefore, must rest on the view that no Dominion can in the long run be content with less than nationhood, and that, therefore, it must either obtain through federation a share in the control of foreign policy or by claiming independence attain full development. The first part of this argument is as true as it is trite, but the conclusion drawn has no cogency, since time is an essential element in all political affairs, and it may well be that for the present the Dominions are too weak to set up as independent Powers, and too inferior in population and resources to the United Kingdom to render it desirable for them to enter into a federal relation, and that, therefore, the proper course is for the development of some system of consultation and discussion on foreign affairs and defence, such as has since 1912 been in effective and successful operation between the United Kingdom and Canada.

If, with the usual disregard of theorists for practical considerations, we seek to bring about a full measure of federation, it is well to consider what the results would be. The United Kingdom would have to allow its fiscal policy to be determined, it may be, by the votes of Dominion representatives, and to surrender its exclusive ultimate control of foreign policy. These sacrifices would, however, be greatly mitigated by the fact that for a considerable period it would possess an overwhelming majority of the votes in the Federal Parliament. The Dominions, however, would have to surrender much of their Customs revenue, to find new sources to replace the loss, to contribute in much larger measure to Imperial expenditure, and, what is most of all, to abandon the protection of their industries against the manufacturers of the United Kingdom. This consideration alone disposes of the idea that such a form of federation is ever possible, and the 'Round Table' group

expressly reject as utterly impossible any such conception of federal union; but this action, which brings them into the position of Sir J. Ward, though they hardly admit their obligation, leaves still most serious difficulties to be met.

On this conception a Federal Parliament and Government would deal with foreign affairs and defence. It would decide the expenditure on these subjects which would have to be met by the different parts of the Empire, the basis of contribution being decided on grounds of population, wealth, and any other relevant considerations, by a Commission, and readjusted from time to time, and coercive power to exact the contributions being accorded to the Imperial Government and Parliament. It is obvious that there would thus be created the same defect as was pointed out by Sir W. Laurier as fatal to Sir J. Ward's scheme—the rate of expenditure would be fixed by a body which would have no real responsibility for raising the money. The defect is also one which cannot be removed, since the power of taxation is one which can be used vitally to affect internal matters in a country (e.g. Custom and Excise duties, land taxation, &c.), and the scheme aims at preserving local autonomy, save for foreign affairs and defence. Secondly, control of military and naval affairs would mean that the Imperial Parliament could, e.g., enact compulsory service for Canada (though both political leaders there repudiate it, and Quebec would not have it at any price), merge the Australian fleet in the British, compel Canada to abandon any idea of ever having a fleet of her own, and make foreign service compulsory on the Dutch in South Africa. It may be hoped that a Federal Parliament would do none of these things, but a body which had *ex hypothesi* nothing else to do would certainly be active, and the controversy over Home Rule in this country shows how vain it is to expect moderation in Parliaments. It follows, therefore, that no Dominion is in the slightest degree likely to consider for a moment such a proposal of federation, while if *per impossibile* it were brought about in a fit of enthusiasm, it would in a very short time result in the disintegration

of the Empire. Many other objections present themselves; a foreign policy for the federation which had no control of tariffs or immigration—matters reserved as essential to local autonomy to the Dominions—would find itself helpless, and quasi-diplomatic relations between the members of the federation and foreign Powers would take its place. Again, the proposal to place India under the federation ignores entirely the fact that national feeling in India would repudiate the idea that the Dominions, from which Indians are rigidly excluded, and in some of which resident Indians are unfairly treated, should have any voice in their government, while both in the case of foreign affairs and in the matter of the government of dependencies it would be deplorable to place power in the hands of a Parliament which from lack of any other work to do would insist on interference in detail.

It is doubtless a sense of the grave difficulties of any form of federal union which has prevented practical statesmen, however favourable to closer relations, such as Sir R. Borden and Mr. Hughes, from coming forward as champions of federation. Sir W. Laurier still maintains, as do the majority of his great party in Canada and the most of Quebec, his preference for isolation, and the same opinion is notoriously held by General Botha.

### 3. FEDERAL PROPAGANDA AND THE REFERENDUM IN AUSTRALIA

*To the Editor of THE SCOTSMAN, 1 November 1916.*

In your leader on the question of the referendum in Australia in your issue of to-day the opinion is expressed that Mr. Hughes could probably have carried a compulsory measure through the Legislature, as has been done in New Zealand, without troubling to take the individual opinion of the electors. I venture, however, to think that this view is based on a misapprehension of the actual position and of the motives which affected Mr. Hughes's action.



When Mr. Hughes left Australia on his visit to the United Kingdom, he was in the position of having pledged his party to the view that conscription should not be resorted to. On his return, when he announced his change of policy, he found that the majority of his supporters were not ready for the action required. He could indeed have carried a Bill for conscription through the House of Representatives, but only by the help of the Opposition, which was practically solid in support of conscription, and by using the votes of the minority of his own party. In the Senate, as a result of the unhappy mode of election, which eliminates minorities, Labour has a majority of five to one, and it is not, I believe, doubted that it would have been impossible for Mr. Hughes to have carried any Bill for conscription through that House. He decided, therefore, to adopt the referendum, which is of course popular with his own party, as a means of securing, in the event of success, sufficient popular pressure to induce the Senate to accept the measure. For this purpose an effective victory in the referendum was obviously necessary, and this he has failed to secure. But it should in justice to Mr. Hughes be recognized that no alternative policy was really open to him.

Among the causes of Mr. Hughes's failure to convince the Labour party of the necessity of compulsion, importance attaches to a consideration which is not mentioned in your leader. The Labour party in the Commonwealth is intensely suspicious of any appearance of interference from without, and the somewhat exaggerated honours bestowed on Mr. Hughes during his stay in this country, while regarded here as no more than a graceful recognition of the services rendered by Australia to the Empire, were interpreted by Labour as indicating that Mr. Hughes had been captured by the spirit of British Imperialism, and that whatever he proposed was suspect. The feeling now manifested to Mr. Hughes is merely a recrudescence of the spirit with which Sir E. Barton was greeted when he asked the Commonwealth Parliament to make good the naval defence undertakings assumed by him on behalf of the

Commonwealth at the Colonial Conference of 1902, and its importance lies in the fact that it forms an insuperable barrier to the establishment in the near future of any form of Imperial federation. It is significant that in New Zealand, where compulsion has been adopted, and in that Dominion only, is there any real feeling for the consummation of a closer constitutional union between the different parts of the Empire, and that not only Sir Wilfrid Laurier in Canada, but also General Botha in South Africa have laid emphasis on their total opposition to any scheme for Imperial federation.

#### 4. MR. HUGHES AND PREFERENCE

*To the Editor of THE TIMES, 3 August 1918.*

While it may be felt that the Radical Council take too seriously the excursion of Mr. W. M. Hughes into British politics, it is not desirable to dismiss as lightly as most supporters of the policy of protection and preference are disposed to do, the constitutional aspect of the problem. The interest of Australia in the tariff policy of the United Kingdom is secondary and derivative; that of the people of these islands primary and immediate, and both political parties in Canada have emphatically approved the doctrine, so clearly laid down by Sir Robert Borden, that the question of that policy is one which must be decided by the people of the United Kingdom without pressure from the Dominion. Mr. Hughes's action therefore stands condemned by Sir Robert Borden, no less than by the Radical Council, and his only reply is that, if he were a Bolshevik, he would be at liberty to urge his policy on the United Kingdom. This apologia completely ignores the fact of Mr. Hughes's official position, which carries with it obligations as well as privileges. *Prima facie* Mr. Hughes speaks for the Commonwealth of Australia; the attention which his utterances command is largely based on his representative position, and his action constitutionally amounts to

an effort by the Commonwealth Government to intervene in a matter primarily of British domestic policy.

A simple parallel will show the impropriety of action of this nature. It cannot be denied that the failure of Australia to enact conscription has added gravely to the burden of military service in this country, and that the interest of the United Kingdom in the adoption of conscription is at least as great as that of Australia in the grant of preference. Yet, if a member of the British Government proceeded to Australia and addressed public meetings in support of conscription, his action would be denounced as unconstitutional by every section of opinion in the country, and certainly not least so by those upon whose political support Mr. Hughes now rests. We in this country are less sensitive to breaches of the rules of constitutional propriety, but they are none the less to be deprecated. The recognition of the full autonomy of the Dominions and of their position as equal members of the Empire demands, as Canada readily admits, similar recognition of the autonomy of the United Kingdom. To produce such measure of harmony as may be possible between the action of these autonomous units is the function of the Imperial Conference at which the Governments of the Empire take counsel together, and the sharp opposition between Mr. Hughes and Sir R. Borden which has already emerged is sufficient indication of the confusion and bitterness which will arise if Dominion Governments seek to carry on electioneering campaigns in favour of any political party in the United Kingdom.

## 5. IMPERIAL UNITY

*To the Editor of THE SCOTSMAN, 19 August 1918.*

May I point out that the measures to secure continuity of consultation between the United Kingdom and the Dominions<sup>1</sup>

<sup>1</sup> See Keith, *War Government of the British Dominions*, p. 31.

announced in your issue of to-day are not only valuable in themselves, but have the great merit of making effective, in a form adapted to war conditions, the proposals of Mr. Asquith's Government which were communicated to the Dominion Governments by Mr. Harcourt on December 10, 1912? The essential feature of these proposals,<sup>1</sup> which were matured after consultation with Sir Robert Borden, was that the Dominions should each be represented in London by a Minister, who would have direct access to the British Prime Minister and the Secretaries of State on all matters of Imperial policy, and be invited to take part in the proceedings of the Committee of Imperial Defence on all occasions when matters interesting the Dominions were under discussion. It was, however, added that if any other mode of securing the object desired, effective consultation, were preferred by any Dominion, the Imperial Government would be glad to accept it. Unfortunately, even in 1912, the dislike of the Dominions to be involved in any way in Imperial affairs was too strong to permit of any Dominion except Canada acting on the suggestion, and it is no small thing that the lessons of the war have enabled the Dominions Prime Ministers to accept the principle without reserve.

The changes in the new proposals are practically only of form. The suggestion of direct communication between Prime Ministers will, it may be hoped, not be interpreted in the sense that the Resident Minister is to be ignored, or his utility will be almost entirely lost, since the essence of his appointment is to create a ministerial link between the Governments. The Imperial War Cabinet necessarily takes the place of the Committee of Imperial Defence, and there is thus a change to a body which takes decisions from one with advisory functions. The difference is, however, one of form rather than of substance; before the war the composition of the Committee of Imperial Defence was such that its advice was practically certain to be accepted by the Cabinet and in the Imperial War

<sup>1</sup> See Keith, *Imperial Unity*, pp. 322-6, and No. 1, *ante*.

Cabinet itself, in case of disagreement, it is inevitable that the decision should lie in the last resort with the British Prime Minister.

## 6. THE DOMINIONS AND THE PEACE CONFERENCE

*To the Editor of THE TIMES, 13 November 1918.*

It is deeply to be regretted that the Prime Minister of the Commonwealth should have ground to complain that the principles of the terms of peace should have been decided upon without consultation with the Dominion Governments.<sup>1</sup> The defence of the action of the Imperial Government in this matter given by you on Friday diminishes greatly the effect of Mr. Hughes's representations, but it leaves unsolved a difficulty which immediately presents itself on reference to Mr. Lloyd George's statement regarding the proceedings of the Versailles Conference in the House of Commons on November 5. The Conference was attended, among others, by representatives of Greece and Portugal, but not by any representatives of the Dominions. The interest of Australia in the war is as great as that of any of the minor Powers, and every consideration of expediency and prudence demanded that Mr. Hughes should have been asked to accompany the British Ministers to Versailles, where he could have learned, in communication with the representatives of the Allied Powers, the cogent reasons which rendered it desirable to abandon the natural demand for an indemnity for the costs of the war, and which justified the failure to state expressly that the Allies interpret Mr. Wilson's terms as rendering impossible the return to Germany of her colonies.

The Dominions are to be represented at the Peace Conference, but it is not stated in what manner this representation is to be accorded. Are their representatives to be members of the British delegation simpliciter, or are they to be granted separate powers to represent His Majesty in respect of each

<sup>1</sup> See Keith, *War Government of the British Dominions*, pp. 146-50.

of the Dominions? The question is not a merely formal one; it involves constitutional considerations of the utmost importance,<sup>1</sup> and it will be of the highest interest to learn which position is desired by the Governments of the Dominions.

## 7. THE AIR CONVENTION: REPRESENTATION OF THE BRITISH EMPIRE

*To the Editor of THE TIMES 20 September 1919.*

Scarcely enough attention appears to have been directed to the remarkable provisions of the Convention relating to International Air Navigation regarding the position of Great Britain, the Dominions, and India. While the Covenant of the League of Nations frankly recognizes the right of the Dominions and India to the status of European Powers, such as Belgium, the Air Navigation Convention makes a serious inroad on this doctrine in a manner affecting markedly the position of the United Kingdom itself. On the International Commission for Air Navigation, to which under the Convention many important duties are entrusted, the British Empire as a whole is to have only the same voting power as the United States, France, Italy, and Japan, thus departing entirely from the principle adopted in the League Covenant. Moreover, the Convention leaves it utterly obscure whether or not the total British vote must be cast as a unit, and, if so, in what manner it is to be determined. The representation on the Commission, as distinct from voting power, is allocated on the basis of two members to each of the other four Great Powers, and one member to the United Kingdom, to each of the Dominions, and to India. If the votes of the Empire are to be determined by the majority of the representatives, the United Kingdom will plainly be deprived of its just influence; if by the United Kingdom, the Dominions and India lose their separate status.

<sup>1</sup> Separate representation was urged by me in 1916 in the *Canadian Law Times*, xxxvi. 856.

The arrangement adopted in the Convention is doubtless a timid effort at compromise to avoid international jealousies such as have manifested themselves in the United States over the voting power of the British Empire. But surely the time is past when timidity in regard to these issues was appropriate? The United Kingdom, the Dominions, and India alike ought not to yield for a moment the position justly claimed and conceded by the Powers which signed the Covenant of the League of Nations.<sup>1</sup>

## 8. DOMINION STATUS: NEGOTIATION OF TREATIES

*To the Editor of THE TIMES, 12 July 1919.*

Viscount Milner's emphatic and admirable assertion of the necessity of the recognition of the complete equality of status between the United Kingdom and the Dominions, in its application to the sphere of trade relations, renders it desirable to draw attention to a difficulty which immediately arises from the recognition in the proceedings and actions of the Peace Conference of the international status of the Dominions. In the past, when at international law the Dominions were not recognized as possessing any personality of their own, it was possible with success to argue that preferential arrangements between the Dominions and the United Kingdom did not conflict in any measure with most-favoured-nation clauses in treaties and did not confer on any nation possessing such a treaty the right to the preference accorded. Under the new régime, however, when the Dominions have an international status of their own, and when their relation to the United Kingdom is that of alliance and not dependency, can the old contention be maintained? Will it not be expedient, even if not absolutely essential, that in concluding any future treaty

<sup>1</sup> The situation was not rectified until May 17, 1933, when a protocol giving each State represented on the Commission one vote was ratified (Cmd. 4423, p. 15).

containing a most-favoured-nation clause the United Kingdom and the Dominions should make it clear that the clause is not to be deemed to come into operation in respect of any inter-Imperial preference? Unless this is done, I do not see how foreign Powers could be denied the right to argue that, as they had conceded the international status of the Dominions, they were entitled to the advantages flowing from such a concession.<sup>1</sup>

A further consideration is suggested by Lord Milner's reference to the independent representation of the Dominions at international conferences. At the Peace Conference the Dominion representatives acted for the Dominions in virtue of full powers granted by His Majesty, a procedure for which precedents had been made prior to the war in the case of the international conferences on radio-telegraphy and safety of life at sea. These full powers were necessarily granted by His Majesty on the responsibility of the Secretary of State for Foreign Affairs, that is, ultimately on the advice of the Government of the United Kingdom, acting, of course, in accordance with the wishes of the Dominion Governments. Is it proposed now to depart from these precedents, and to adopt the practice by which the Governors-General of the Dominions should grant full powers to representatives of the Dominions, as has from time to time been suggested? Would any such procedure not inevitably lead to an emphasis of the distinctness of the parts of the Empire which might render formal separation inevitable? On the other hand, the Dominion Governments cannot be expected to admit, as in the past, the right of the Government of the United Kingdom to control their power of negotiation, but this difficulty might be evaded by the adoption of the constitutional convention that the issue of full powers to Dominion representatives on the request of their Governments should be incumbent on the Secretary of State for Foreign Affairs as a ministerial function, excluding any exercise of discretion on the part of the Government of the United Kingdom.

<sup>1</sup> See No. 77, *post*.



## 9. THE TERRITORIAL AMBIT OF DOMINION LEGISLATION

*To the Editor of THE TIMES, 2 March 1920.*

Exceptional importance attaches to the proposal of the Canadian Government to obtain an amendment of the British North America Act, in order to authorize the Dominion Parliament to enact laws to take extra-territorial effect to the same extent as laws can be enacted by the Parliament of the United Kingdom. The proposal is the first formal step to carry out the principle of the equality of status of the Dominions with the United Kingdom, enunciated at the Imperial War Conference of 1917. The limitation of the operation of Dominion legislation to territorial limits arises directly from the Colonial status which the Dominions have now outgrown, and the necessity of the removal of the restriction became obvious more than a decade ago, when Canada proposed to create a naval force of her own, since it was clear that the Dominion Parliament had no adequate power to regulate a force destined to operate outside the territorial limits of Canada.

An obvious difficulty, however, arises from the form in which the Canadian proposal is couched. If Canada obtains the same right of extra-territorial legislation as is possessed by the United Kingdom, cases may arise to which both a Canadian and a British law may be applicable. As matters at present stand, the Canadian law, if divergent from the British, would be void in so far as it was repugnant to it, but the whole doctrine of invalidity on the ground of repugnancy is, like the doctrine of the British power of disallowance of Canadian legislation, in contradiction with the Dominion's claim to autonomy, and must in due course be formally repealed.<sup>1</sup> Conflict between British and Canadian jurisdiction will then fall to be dealt with on the basis that each Legislature will confine the extra-territorial operation of its legislation to those British subjects over whom it normally exercises control,

<sup>1</sup> Effected by the Statute of Westminster, 1931, s. 2.

so that Canada will legislate for Canadian British subjects when outside Canada. Though there are difficulties in this mode of procedure, they are not insuperable.<sup>1</sup> Canada has already in her immigration legislation had to determine what constitutes Canadian citizenship, and the Dominion cannot be expected to forgo any of the powers which are justly her own in virtue of the international status which she has achieved as a member of the League of Nations.

## 10. THE DOMINIONS AND THE LEAGUE

*To the Editor of THE TIMES, 26 April 1920.*

The Duke of Devonshire has reiterated the determination of Canada to remain part and parcel of the British Empire while enjoying full national status. How these conflicting aspirations are to be realized should have formed the subject of an Imperial Conference, but we know now that there is no possibility of the holding of a Conference this year, and, as Sir James Allen's statement reported in your issue of April 22 proves, steps in the reorganization of Imperial relations are already being taken which will largely predetermine the decisions of the Conference. It is impossible not to regret such a result; the relations of the Dominions and the United Kingdom are matters to be determined in full publicity, for the changes which are now being carried out are, however inevitable and desirable, revolutionary in character.

There can hardly be any doubt as to the answer which the greater Dominions must return to the question of the mode of conducting their relations with the League of Nations. To consent to forward their representations through the Government of the United Kingdom, as New Zealand may be willing to do, would be a negation of their true national status, and the Canadian reception of Viscount Grey's suggestion regard-

<sup>1</sup> Unfortunately the Statute of Westminster, 1931, s. 3, merely gives general power, leaving conflict possible; see Keith, *Constitutional Law of the British Dominions*, pp. 32-4, 226-30.

ing voting power within the League is clear proof how deeply felt is the necessity of insisting on the new position of the Dominion—a view which is further embodied in the decision of the Government at Ottawa to secure Canadian diplomatic representation at Washington. The establishment of a Secretariat in London to co-ordinate representations from the Dominions to the League is incompatible with anything short of a federal constitution, which is out of the question. There remains only, therefore, the plan of consultation among all the members of the League within the Empire before representations to that body are made, and it should be easy to secure agreement in the principle that neither the United Kingdom nor any Dominion should address any communication to the League save after consultation with the other parts of the Empire.<sup>1</sup> The adoption of this mode of procedure would diminish, even if it would not eliminate, the possibility of acute divergence of views between the various Governments, and no Dominion could object to acting on a principle which was applied equally to the United Kingdom. On the other hand, any proposal which might seem to maintain any superiority of the United Kingdom to the Dominions would, I feel convinced, increase rather than diminish the risk which Sir James Allen properly emphasizes, of the formal separation of the Dominions from the United Kingdom—a step which would be in the ultimate interest of neither party.

## II. IRELAND AND THE EMPIRE

*To the Editor of THE SCOTSMAN, 23 July 1920.*

It is surely impossible to anticipate any substantial improvement in Irish affairs as a result of the new measures announced by the Chief Secretary in the House of Commons yesterday. It must be remembered that not only is the great majority of the Irish outside Ulster in open opposition to the Government, but that in all political parties in the United Kingdom there

<sup>1</sup> This procedure has not yet been adopted.

are many who hold that after championing the doctrine of self-determination against the central Powers the United Kingdom cannot refuse to consider how far it can be applied to the British Empire. Measures of repression sufficiently vehement to suppress even for a time the Sinn Fein movement could not possibly be carried out in view of the attitude of British Labour.

Order will be restored only when the majority of Irish people outside Ulster is convinced that their desires for self-determination have been sufficiently met. The present Government of Ireland Bill is obviously useless for this purpose; pursuing the vain ideal of an undivided Ireland, it creates a Council with illusory functions and an Ulster Parliament, which is neither desired by Ulster nor in itself advantageous, and denies to the Parliament for the rest of Ireland essential powers of taxation. Nor can any success be expected from the Prime Minister's suggestion of private negotiations, for Sinn Fein has nothing to gain from debate with the Government. What is required is the passage through Parliament without further delay of an Act representing the utmost concessions which can be made to Ireland in the hope that thus the Republican movement may be defeated.

Such an Act should grant to Ireland, excluding the six Ulster counties which should remain under the present control of the Imperial Parliament, the measure of self-government which was possessed by the Dominions before the war. The present position of the Dominions (other than Newfoundland) is practically that of independent powers, possessing an international status which the people of the United Kingdom are not prepared to concede to Ireland. Under the Constitution which would be granted, Ireland would have complete control of her taxation, including her tariff, and be entitled to the good offices of the United Kingdom in concluding commercial treaties applicable to Ireland, subject, however, to the rule that any terms given to a foreign Power were conceded automatically to the United Kingdom. She would be entitled to

maintain military forces for protection against external attack, and would make only voluntary contribution to the general cost of Imperial defence. The advantages of such a position might well be judged by the bulk of the Irish people to outweigh a republican status, especially if the latter can be attained only by war, while the loss of a fixed Irish contribution to Imperial expenses would be a small price to pay for the restoration of peace in Ireland.

It is of course possible that, even if such an Act were passed, the Irish might refuse to work it, either because there was no coercion of Ulster, which would be left free to unite later with the rest of Ireland, or because the republican status was not conceded. But it can hardly be doubted that in this event the Government of the United Kingdom would be in a more effective position to enforce its authority in Ireland, since it would command far more united and loyal support in England and Scotland alike.

## 12. IRISH SETTLEMENT ON THE BASIS OF DOMINION STATUS

*To the Editor of THE TIMES, 18 August 1920.*

The Prime Minister's policy of repression in Ireland, coupled with an offer to negotiate which obviously will not be accepted, is conclusive evidence of the bankruptcy of his statesmanship on this vital issue. It is obviously the duty of the Government to produce and to pass through Parliament on their own authority a measure embodying the utmost limit of concession to Ireland consistent with the safety of the United Kingdom and the due protection of minorities. That the people of Ireland would refuse to work a constitution of this kind cannot be predicted with any certainty; if they did, the Government would be morally in a position to enforce its authority.

Is there any really valid reason for refusing to give to Ireland (excluding of course north-east Ulster) the status possessed

by the self-governing Dominions prior to the war? The Dominions have, of course, attained, as members of the League of Nations and for other reasons, since then a position of practical independence which the people of this country are not prepared to concede to Ireland. This would involve the cessation of any save a voluntary contribution to Imperial expenditure, and the grant of full fiscal autonomy subject to the rule that no foreign Power received better terms than the Empire. The Imperial Government would be bound to negotiate, if desired, commercial treaties for Ireland, but Ireland would have no diplomatic status and no foreign policy of her own. If Ireland desired to possess naval forces, she would have to arrange the matter with the Admiralty, and to agree that her ships would on the outbreak of war come under immediate Admiralty control. She could raise military forces, but neither in peace or wartime could she close her harbours to British ships.

Have the Prime Minister and his colleagues forgotten the effect of the grant of self-government to the Transvaal? Generosity may, repression certainly will, fail to restore peace.

### 13. SOUTH AFRICA AND IRELAND AND THE EMPIRE

*To the Editor of THE SCOTSMAN, 7 December 1920.*

The interpretation in your issue of to-day of Mr. Asquith's proposal to grant Dominion Home Rule to Ireland in the light of General Smuts's programme for the future of the Dominions seems to me to rest on a misunderstanding of Mr. Asquith's position. That statesman has now made it perfectly clear that what he contemplates for Ireland is the position occupied by the Dominions during his tenure of office as Prime Minister, which alone, it may be added, can with any propriety be styled Dominion Home Rule. The basis of General Smuts's position is the concession to the Dominions of an international status as members of the League of Nations, and his ideal is

not Home Rule as hitherto, but Dominion independence within the British Commonwealth and the League of Nations. Mr. Asquith has, I believe, been careful to avoid the suggestion that Ireland should be admitted a member of the League.

Apart from this issue, it may be hoped that your leader will induce a fuller realization of the extraordinary extent to which the war has loosened the effective ties between the United Kingdom and the Dominions. The Constitutional Conference of 1921, which was to have found some means for closer consultation on matters of Imperial concern, has been abandoned, and there is no sign that any really satisfactory system has been devised to secure that, despite the new status of the Dominions, there shall be a single foreign policy for the whole of the Empire.

#### 14. IMPERIAL RELATIONS

*To the Editor of THE TIMES, 25 April 1921.*

The essential facts regarding Imperial relations to-day are the recognition at the Peace Conference of the international status of the Dominions, and the absence of any agreement as to the method in which this recognition is to be made effective in practice. The process of development of Imperial relations was inevitably accelerated in an unprecedented manner by the formation of the League of Nations. The Dominions were thus compelled at a much earlier date than had been anticipated to assume a status for which they were not fully prepared, a fact which Mr. Fielding has emphasized more than once in the Canadian House of Commons. This lack of preparation is evinced most conclusively by the unwillingness of the House of Commons and of the Dominions, even including Australia, to face the burden of a just share in the cost of naval defence; years, it must be admitted, will elapse before the United Kingdom can expect any serious aid in this regard, save possibly from the Commonwealth.<sup>1</sup> General Smuts,

<sup>1</sup> Up to 1935 only Australia and New Zealand had assumed any serious share in the burden of naval defence, and in all cases protection is still essentially

despite his wholehearted doctrine of autonomy, has admitted his misgivings regarding the part which the Union can play as regards naval defence.

Imperial relations, therefore, are now in a transitional state, which may be of considerable duration, and the immediate problem for the Imperial Conference (Cabinet is a misnomer which merely excites misgivings in the Dominions) meeting in June is to seek to devise some reasonably effective way of co-ordinating Imperial foreign policy. The Empire at least ought to be united on the issue of reparations, and Dominion statesmen must realize that an international status implies that foreign policy must now occupy their serious attention from a broader point of view than mere Dominion interests. But the process will be gradual, for it must be one of spontaneous evolution in the public feeling of the Dominions themselves.

#### 15. THE IMPERIAL CABINET: A MISNOMER

*To the Editor of THE TIMES, 27 April 1921.*

With reference to your leading article of to-day, may I explain briefly why the term Imperial Cabinet still seems to me a misnomer, likely to prove a stumbling-block to the development of Imperial co-operation? In the Dominions as in the United Kingdom the term 'Cabinet' carries with it, as a result of constant usage, the suggestion of a body of Ministers who (1) owe a common responsibility to a single Legislature; (2) are united by loyalty to a Prime Minister; and (3) are wont to decide policy by majority votes, the minority being bound to accept and faithfully execute majority decisions.

None of these criteria apply to the Imperial Cabinet.<sup>1</sup> There is no Imperial Legislature to which it could be responsible. The British Prime Minister may preside, but only, as Sir R. Borden insists, as *primus inter pares*. But, what is still more important, it cannot take a majority decision. When you write 'it will be provided by the British fleet. In 1934 the Union of South Africa decided to confine its efforts to coastal defence works as opposed to a naval force.

<sup>1</sup> The term was dropped from this time onwards; cf. Keith, *War Government of the British Dominions*, pp. 33-5.



make decisions on matters affecting the common interests of the British group of nations', you do not, I am sure, mean that a Dominion Minister is bound to accept a majority vote of the Cabinet to the extent of asking his Parliament to carry out any policy so decided upon. When such a doctrine was attributed, doubtless in error, to Lord Milner, General Smuts immediately repudiated it. If a Dominion Premier dissents from a line of policy proposed by the majority of the Imperial Cabinet, the decision of the majority is null as regards his Dominion. Even, however, if he accepts it, he is under no obligation of any sort to resign office if his colleagues or his Parliament will not honour his acceptance.

The essence of the work to be done is consultation with a view to secure by agreement co-operation, not the taking of decisions in the sense which is normally attached to Cabinet deliberations. Now this is precisely the work done by the Imperial Conference of 1911, and 'Conference' is therefore in my opinion the only appropriate term for the meeting of this year. You object that the Imperial Conference only met at distant intervals and passed resolutions, and that its advice was seldom taken. The Imperial Cabinet has not met for two years; it cannot, as I have shown, take binding decisions; and it is unduly pessimistic to hold that the advice of the Imperial Conference was seldom taken. The only flagrant instance of refusal to act on a Conference resolution known to me is that of His Majesty's Government in failing to honour the pledge regarding the admission of Canadian cattle given at the Imperial War Conference of 1917.<sup>1</sup>

#### 16. THE DISARMAMENT CONFERENCE: DOMINION REPRESENTATION

*To the Editor of THE TIMES, 14 July 1921.*

The President's action in refraining from extending any separate invitation to the Dominions to be represented at the Disarmament Conference is a necessary deduction from the

<sup>1</sup> The pledge was honoured in 1922.

refusal of his party to accept the separate voting power allotted to the Dominions in the League of Nations. The same consideration has prevented the appointment of an independent Canadian representative at Washington and necessitated the compromise which has not yet been carried into effect.

For practical purposes the difficulty can be surmounted by the inclusion of Dominion representatives in the British delegation, but the episode is of fundamental importance as a reminder that, as far as concerns the United States, the Dominions have not attained the international status which must be recognized as theirs by all the Powers which ratified the treaty of peace with Germany. The inchoate recognition conferred by the negotiations of President Wilson was obliterated by the refusal of the Senate to approve his action, and it must be recognized that the status of the Dominions is still imperfect, so long as it is not recognized by the greatest of the world Powers.<sup>1</sup>

## 17. DOMINION APPEALS

*To the Editor of THE TIMES, 29 November 1921.*

Lord Cave's reply in your issue of to-day to Mr. J. S. Ewart's criticism of his views on appeals to the Privy Council is doubtless justified in so far as it insists that the balance of legal opinion in Canada still upholds the value of the appeal, though obviously lawyers cannot be quite disinterested in such a matter. On the other hand, Lord Cave is clearly in error in endeavouring to dispose of the evidence against the appeal contained in the utterances of Mr. Hughes, Mr. Rowell, and Sir R. Borden by suggesting that Mr. Ewart's quotations are misleading if severed from their context. Read with their context, they entirely bear out the view of Mr. Ewart; they intimate clearly that public opinion in the Dominions is

<sup>1</sup> Recognition was fully accorded in 1924 when an Irish Minister was received on a footing of equality with the British Ambassador, and the proposal that the Canadian representative should act for the Ambassador in his absence was dropped. See Keith, *Responsible Government* (ed. 2), II. 894, 895, 1252, 1253.

steadily adopting the doctrine that the carrying of appeals to the Judicial Committee is derogatory to the national status of the Dominions.<sup>1</sup> Nor, of course, can this view be successfully disputed. The appeal is a relic of Imperial supremacy and of a time when colonial Courts might have perpetrated grave injustice, had they not been subjected to effective control. Under the Constitution of the Union of South Africa appeals have *de facto* practically ceased to be allowed, and there is something frankly incongruous that appeals should come more freely from courts certainly not inferior in status to those of the Union.

The action of the Legislature of Quebec<sup>2</sup> cannot, I fear, be defended on the grounds adduced by Lord Cave, who perhaps has not had occasion to study the attitude of the Provincial Legislature to the Judicial Committee. The fact that the Legislature has not attempted to extinguish the appeal has a simple explanation: owing to the Imperial Act of 1844 no legislature in Canada has the power to prevent appeals being brought to the Committee.<sup>3</sup>

The only hope for the preservation of the appeal lies in the expedient, suggested first in 1900 and revived with his wonted energy by Mr. Hughes, that the Judicial Committee and the House of Lords should be merged in a single Imperial Court of Appeal. The project has practical difficulties: it is regarded with little favour in legal circles in the United Kingdom, and there is only too much reason to fear that the chance of creating a lasting expression of Imperial unity is now being permitted to pass away for good.

## 18. DOMINION STATUS IN IRELAND

*To the Editor of THE SCOTSMAN, 28 November 1921.*

Political memories are notoriously short, but it is hardly credible that Lord Birkenhead should have forgotten so absolutely the famous definition of Dominion Home Rule given

<sup>1</sup> Keith, *War Government of the British Dominions*, pp. 285-8.

<sup>2</sup> Keith, *Imperial Unity*, pp. 375-8.

<sup>3</sup> This statement was proved correct by *Nadan v. R.*, [1926] A.C. 482.

by Mr. Bonar Law, when Leader of the House of Commons, on March 30, 1920. The Lord Chancellor, as reported in your issue of to-day, states that, 'with these exceptions (namely, tariff questions and naval arrangements), we have offered to the population of Ireland exactly the same powers as are exercised by the citizens of Canada'.

Now what in the view of Mr. Bonar Law is the effect of Dominion Home Rule? Replying to Mr. Asquith in the discussion of the Government of Ireland Bill he said: 'But it goes much further than that. To say that he is in favour of Dominion Home Rule means something much more. There is not a man in this House, and least of all my right hon. friend, who would not admit that the connexion of the Dominions with the Empire depends upon themselves. If the self-governing Dominions, Australia, Canada, choose to-morrow to say, "We will no longer make a part of the British Empire", we would not try to force them. Dominion Home Rule means the right to decide their own destinies.'

None of Mr. Bonar Law's colleagues in either House contradicted his views at the time, and his opinion must accordingly be regarded as the official announcement, not merely of one, but of both wings of the Coalition. If, therefore, Lord Birkenhead's statement is true, even if Sinn Fein accepted at present Dominion Home Rule, and Northern Ireland amalgamated with the rest of the country with provincial status, it would be open to the Irish Parliament at pleasure to terminate its connexion with the British Empire.<sup>1</sup>

I cannot imagine that Lord Birkenhead really contemplates anything of the sort, but his statements as they stand are open to the most dangerous misconstruction.

### 19. LORD ABERDEEN ON HOME RULE

*To the Editor of THE SCOTSMAN, 11 November 1922.*

I regret to find that the Marquis of Aberdeen still clings to the doctrine of the coercion of Ulster. Mr. Asquith abandoned

<sup>1</sup> For the raising of the issue, see Nos. 98-101, *post*.

that policy fully and frankly in 1914, and has never since varied his position. In 1921 the Unionists gave up the convictions of a generation, and to the great advantage of the Empire agreed to concede self-determination within the Empire to Southern Ireland. No Liberal, I trust, would ever be a party to any proposal to force Northern Ireland under the control of the Irish Free State. If unity is to be achieved, there is one means only by which it can satisfactorily be attained—the free consent of the two Irish Parliaments.

Lord Aberdeen's arguments against Ulster have often been refuted, and it may suffice to say that what matters is not Lord Aberdeen's views of the rights of the people of Ulster, but their own wishes voiced through their chosen representatives, and to remind him, as a former Governor-General of Canada, of the instructive contrast between the assurances of Lord Durham, which brought about the union of Upper and Lower Canada, and the actual results of that enforced union, which had to be undone a quarter of a century later, with the most satisfactory results. Would Canada have attained its present good fortune had Quebec ruled Ontario or Ontario Quebec?

## 20. SELF-DETERMINATION FOR IRELAND

*To the Editor of THE SCOTSMAN, 17 November 1922.*

The Marquis of Aberdeen's letter in your issue of to-day leaves me still doubtful as to his views on coercion in Ireland. From the first I have maintained what is now, I believe, the faith of the vast body of Conservatives and Liberals, that Northern and Southern Ireland have an equal right to self-determination within the Empire, and that it is unjust and unwise to coerce either, whether directly or indirectly.

That both parties should agree on this point is unquestionably the most favourable augury for the creation of a democratic party of the future which you forecast in your issue of

to-day. But such a party can come into being only through the definite rejection by Conservatives of reactionary tendencies and the frank acceptance of democratic ideals, of which signs have been given in their treatment of the Irish, Indian, and Egyptian problems. The result of the elections has given Mr. Bonar Law a unique opportunity to prove whether he has the constructive statesmanship to enter upon a policy of ordered but effective progress; the country is doubtless tired of rash experiments, but it will certainly not tolerate a policy of mere negation which will play directly into the hands of extreme Socialism.

## 21. THE EFFECT OF THE IRISH TREATY

*To the Editor of THE SCOTSMAN, 10 December 1921.*

It is natural that the Lord Advocate should grudge Mr. Asquith due credit for his contribution to the solution of the Irish problem, but it is unfortunate that he should misrepresent the facts in his effort to discredit a former leader. Mr. Asquith proposed at Ayr the policy of Dominion Home Rule for Ireland (reserving the position of Ulster); the criticisms made on his proposals were due to misunderstanding of the real nature of Dominion status, and the modifications and restrictions alleged by the Lord Advocate were not, as he implies, changes made in Mr. Asquith's proposals, but explanations showing the real nature of the Dominion status proposed.

Strangely enough, the Lord Advocate seems not to comprehend the true nature of the settlement embodied in the new document, but to think that the arrangement preserves the principles asserted as essential by the Prime Minister on November 11, 1920, which denied to Ireland the power to set up an army and a navy and to conduct foreign relations. As a matter of fact, the settlement expressly adopts the status of Canada as the premier Dominion for the model of the position of the Irish Free State. It concedes the right of that

State to maintain an army, subject only to the principle of the international limitation of armaments which is equally applicable to Great Britain and Canada. It allows the Irish Free State to establish its own coast defence after a period of five years, while Canada is not prepared to undertake even so much naval responsibility. What is far more important, the Irish State receives, in a much more distinctive manner than Canada, international status so far as Great Britain can confer it. Does the Lord Advocate not realize that the official description of the instrument as a 'Treaty between Great Britain and Ireland' implies the recognition of Ireland as a sovereign Power, and that any foreign Power which so desired could claim that Great Britain had recognized full Irish sovereignty in this instrument? Does he not realize that Ireland can now demand the use of the influence of the British Empire to support her claim for admission as an independent member of the League of Nations,<sup>1</sup> and that, like Canada, she can assert the right to be represented at foreign capitals by ministers plenipotentiary reporting direct to and taking their instructions from the Irish Government alone? Moreover, Great Britain will no longer be able to bind the Irish Free State by any treaty, and, to secure harmonious action, Irish plenipotentiaries will have to be associated with British plenipotentiaries in any negotiation.

Indeed the new arrangement in one respect goes beyond anything contemplated by Mr. Asquith, for it contains nothing to assure the permanence of the allegiance of Ireland to the King; on the contrary the official attitude of the present Government, as asserted as recently as March 30, 1920, by Mr. Bonar Law, is that the right of secession is inherent in Dominion status, and, so far as I can see, those Irish leaders who may to-day accept the treaty are perfectly entitled to argue next year that they can declare Irish independence, as they accepted Dominion status as defined by the Government with which the treaty was negotiated.

<sup>1</sup> Accorded in 1923; Keith, *Sovereignty of the British Dominions*, pp. 347 ff.

## 22. THE IRISH TREATY AND IRISH SOVEREIGNTY

*To the Editor of THE SCOTSMAN, 9 January 1922.*

Surely your condemnation of Professor Macneill's proposed resolution<sup>1</sup> regarding Irish sovereignty in your issue of to-day rests on a misapprehension of the implication of the arrangements made by His Majesty's Government with the Irish delegates. The matter is of great importance; nothing can be more inimical to the restoration of good relations between Ireland and Great Britain than the feeling that the Irish Legislature and those whom it represents are acting in bad faith.

The Speaker's proposal is fully justified by the mere fact of the conclusion of the treaty between Great Britain and Ireland of December 6, 1921. The conclusion of that agreement is a formal admission of Irish sovereignty, and Professor Macneill can hardly be censured for asserting what the British Government has formally conceded. The further conclusion that this sovereignty is derived from the will of the people will not, I imagine, be seriously disputed by any person.

It is, in fact, important to realize that the Dominion status of the Irish Free State rests on a different foundation from that of any of the Dominions. These obtained it as a free grant from the Imperial Government and Parliament; the Irish State owes it to a successful rebellion followed by a treaty. We may deplore the lack of statesmanship which has resulted in this position, but we must, clearly, accept loyally a result approved by the Imperial Parliament as the only alternative to an unpopular and purposeless war.

Similarly, it seems to me impossible to take any exception to the action of those members of the Irish Legislature who have accepted the treaty as a stepping-stone to national

<sup>1</sup> Proposed in Dáil Éireann, Jan. 7, 1922: 'Dáil Éireann affirms that Ireland is a sovereign nation deriving its sovereignty in all respects from the will of the people of Ireland.'



independence. The treaty contains no suggestion of permanent allegiance, and the right to secede has been declared to be inherent in Dominion status by Mr. Bonar Law on behalf of His Majesty's Government.

### 23. IRISH FREE STATE LEADERS AND THE REPUBLICAN MOVEMENT

*To the Editor of THE SCOTSMAN, 10 April 1922.*

Is there not a very simple explanation of the inaction of the Provisional Government of the Irish Free State on which you comment in your issue of to-day? It is contained in the assertion of Mr. Gavan Duffy, contained in the same issue, that 'we are all republicans'. The Free State leaders are confessedly believers in the Republic, who merely accept the Free State as a stepping-stone to independence. In these circumstances, how can they wage, or be expected to wage, effective warfare politically or materially against their opponents, whose ideals they share?

Moreover, in Ireland, if not in Great Britain, there is full recognition of the fact that the withdrawal of the British forces deprives the British Government of the possibility of preventing the establishment *de facto* of a Republic in Southern Ireland. Mr. Churchill and others indeed have claimed that there are economic weapons which can be used to prevent the establishment of an Irish Republic. It is difficult to believe that the Colonial Secretary can be blind to the fallacies of his own contentions. An economic blockade of Ireland would inflict on the people of the United Kingdom far greater losses by (1) the increase in the cost of food, and (2) the loss of a profitable export market, than would be inflicted on the people of the Republic, and no sane British Government would enter on a course of action which could only end in one more of those surrenders with which recent history of our relations with dependencies has made us painfully familiar.

## 24. THE COLLINS-DE VALERA COMPACT

*To the Editor of THE SCOTSMAN, 22 May 1922.*

The general surprise at the action of Mr. Collins in his agreement with Mr. de Valera<sup>1</sup> seems hardly justifiable. As I have already pointed out, Mr. Collins is an avowed and unrepentant Republican, who admittedly accepted the Free State merely as a stepping-stone to a Republic, and, at the time when Dominion status was conceded to Ireland, the official view of His Majesty's Government, expressed in categorical terms by the Leader of the House of Commons on March 20, 1920, was that Dominion status carried with it the ultimate right of secession.

It is true that the right has once been denied by Mr. Churchill, but it is equally true that it is not in the power of one party to a contract to alter the meaning of its terms *ex post facto*, and Mr. Collins has made it clear that he has never fettered in any way his right to work for a Republic as his ultimate aim. In these circumstances it would be absurd to expect him to wage war against other Republicans, whose only divergence from him is on a point of tactics.

The sooner the people of Great Britain realize that to keep Southern Ireland a part of the British Empire means the determination to reconquer it and to hold a nation in subjection in contradiction with the action taken in other recent cases, the better for all concerned.

## 25. THE IRISH FREE STATE CONSTITUTION

*To the Editor of THE SCOTSMAN, 16 June 1922.*

The Free State Constitution, even in its revised form, seems hardly to alter in any degree the situation created by the treaty. If the right of secession exists under that instrument,

<sup>1</sup> This agreement contemplated non-opposition by either party to the return to the Dáil of the candidates of the other at the general election of June 1922, but it was largely rendered nugatory by independent voting by the electors under the system of proportional representation, which gave Mr. Collins an effective pro-treaty majority.

as is generally contended in Ireland, then the Constitution does not alter the position. On the contrary, by its emphatic declaration of the sole sovereignty of the Irish people, it conforms with Mr. Collins's doctrine that it is impossible to set bounds to the progress of a nation. In no Dominion constitution is any such claim of sovereignty made.

It must also be noted that the power of disallowing Irish laws is in effect abandoned. The only right formally asserted is that of the right of the Governor-General to refuse assent or to reserve Irish Bills, but this apparent right is nugatory, since it is to be exercised in accordance with Canadian constitutional usage, and by such usage the withholding of assent is wholly obsolete, and reservation takes place only under the terms of Imperial Acts which are no longer to apply to Ireland. In effect, Irish legislation will be wholly exempt from Imperial executive or legislative authority, while the judicial control in constitutional matters is precarious and ineffectively safeguarded.

The admission of common citizenship is rather farcical, since the Constitution expressly creates a new Irish citizenship and the bond is really one of common allegiance.

The concessions now made in Southern Ireland are such as naturally to raise the question why the Republicans carry on a struggle for what is little more than a form. On the other hand, the Republicans have some right to ask: Why deny us a form which we value, when we are ready to concede all you really need as regards foreign policy and defence? Is not the Constitution of the British Commonwealth of Nations elastic enough to include a Republic?

## 26. THE IRISH CONSTITUTION: FUNDAMENTAL ISSUES

*To the Editor of THE TIMES, 16 June 1922.*

The Irish Free State Constitution unquestionably accords with the Irish treaty, for like it, it recognizes the sovereignty

of the people of Ireland, while leaving utterly vague the relations of Britain and Ireland. The following points merit special notice:

(1) Nothing is decided as to the right of Ireland to secede from the Empire. If the treaty allows it, as is arguable, the right remains, and is accentuated by the wide claim of sovereignty for the people of Ireland.

(2) The Constitution vests legislative power in the Irish Parliament, but is ineffective as it stands to exclude the predominance of Imperial legislation and the application of the Colonial Laws Validity Act, 1865, which applies to all British possessions abroad, save where specially excluded. It will be necessary to confer 'sole and exclusive power' on the Irish Parliament; the Imperial Act approving the Constitution will then operate as a renunciation of Imperial legislative supremacy.

(3) No power of disallowance of Acts assented to by the Governor-General is reserved to the Crown contrary to Dominion practice. The right of the Governor-General to reserve, or withhold assent to, a Bill is maintained, but its exercise is to be governed by Canadian constitutional usage. This means in effect that no Bill will be refused assent or reserved, for reservation in Canada is obsolete save under Imperial Acts which are no longer intended to be valid in Ireland, and the withholding of assent is absolutely obsolete. In effect Irish legislation will be utterly unfettered by the Imperial Government or Parliament.

(4) The only safeguard for the observance of the Constitution will be the Irish Courts with a possible appeal by special leave to the King in Council. Attempts to safeguard this appeal are made, but inadequately; the essential provision that decisions by the King in Council shall be binding on Irish Courts is omitted, and as Australian precedent shows cannot be assumed. Further, the Constitution leaves it utterly vague whether the right of appeal may be abolished by the Irish Parliament. Can Ireland be denied a right expressly

recognized in the case of Australia and the Union of South Africa? Is the Constitution as worded sufficient to deny it?<sup>1</sup>

(5) It must be made clear by Imperial Act that Irish legislative authority extends beyond territorial waters; the point requires to be settled for other Dominions also.<sup>2</sup>

## 27. MR. HUGHES AND DOMINION SOVEREIGNTY

*To the Editor of THE MORNING POST, 14 May 1923.*

Just stress is laid by Mr. Hughes, in his most interesting article on the future of the British Empire, on the measure of autonomy attained in practice by the Dominions. It is, however, necessary to remember that there are limits to this autonomy, and that in practice, as well as in theory, the Dominions, even as regards their internal affairs, are not equal members of the Empire. It is true that the power of disallowance is, or should be, obsolete, and that it is hardly conceivable that the Imperial Parliament should ever legislate to override a Dominion statute without the assent of the Dominion. But Mr. Hughes may have forgotten three real operative limitations on Dominion legislative power which are inconsistent with equality of status: (1) the territorial limitation on Dominion legislation, which, with strictly limited exceptions, confines the operation of the Dominion Acts to the territorial limits of the Dominions; (2) the invalidity of any Dominion Act which is repugnant to an Imperial Act, e.g. the Merchant Shipping Acts or the British Nationality and Status of Aliens Acts; and (3) the invalidity of any Dominion Act inconsistent with the sovereignty of the Crown. The reality of the first two of these limitations is shown by the address to the Crown voted in 1920 by the Parliament of Canada asking for the removal of the territorial limitation, an appeal to which His Majesty's Government has not yet re-

<sup>1</sup> See No. 100, *post*.

<sup>2</sup> See No. 9, *ante*. The Free State Courts asserted the right: *R. v. Cork Circuit Court (Judge)*, [1925] 2 I.R. 165; *Keegan v. Dawson*, [1934] I.R. 232.

sponded, and by the long controversy in which Mr. Hughes had a share, over the Commonwealth Navigation Bill. Adjustment of these matters presents real difficulties, especially in view of the fact that the position of the Irish Free State is governed by that of Canada; but the existence of these limitations on autonomy is not to be ignored.

#### IMPERIAL CONFERENCE OF 1911

It is also in some degree misleading to hold that before the war the Dominions took no part whatever in shaping foreign policy, unless the statement is qualified by the very important consideration that in all matters directly affecting the Dominions their Governments were consulted by the Imperial Government, and the desires of the Dominions formed a most vital element in determining the attitude finally adopted by the Imperial Government. What is indubitable is that, until the Imperial Conference of 1911 the Dominions were not consulted on matters of general foreign policy, which was treated as a matter exclusively for the Imperial Government, a position which was regarded, as Mr. Hughes indicates, with complacency by the Dominions. After the discussion of foreign policy, however, at the Committee of Imperial Defence in 1911 and the decision arrived at, with the assent of the Dominion Premiers, to renew the Anglo-Japanese alliance, the possibility of war with Germany being forced on Britain must have been present to some Dominion Ministers at least, as is shown by Sir Robert Borden's effort immediately to strengthen the British fleet, when similar information was given to him on his visit to London in 1912. It is, however, plain that the Dominions were not, and could not be, effectively consulted in the brief period when the war hung in the balance, and it is equally clear that nothing effective has been done to arrange for consultation at present. The cases of Egypt and of the appeal to the Dominions to give help against Turkey in September last<sup>1</sup> are clear illustrations that

<sup>1</sup> See Keith, *The Sovereignty of the British Dominions*, pp. 455-60.

the existing system leaves foreign policy generally, as opposed to matters specifically affecting the Dominions, in the control of the Imperial Government.

#### A FUNDAMENTAL QUESTION

At this point, however, there rises a fundamental question which Mr. Hughes does not discuss. How far do the Dominions desire at present to take part in deciding the general foreign policy of the Empire? The present Government of the Commonwealth apparently desires a change in the existing conditions, but it does not seem clear that in New Zealand there is any feeling on this head or desire to question British monopoly of control. In Canada the Pacific Fisheries Treaty of March suggests an almost exaggerated desire to assert autonomy, and Mr. Mackenzie King is too faithful to the tradition of Sir Wilfrid Laurier to be likely to demand, or even to accept, responsibility for British action in the troubled field of European politics. General Smuts is hampered by the bitter opposition of the Nationalists to any intervention outside Africa. In such a state of Dominion feeling it seems impossible to expect that any substantial step can be taken towards the consolidation of the Empire in respect of responsibility for foreign policy.

Even were it otherwise, Mr. Hughes himself admits the extraordinary difficulty of the problem. His repudiation of federation may help to open the eyes of some of those who in the past decade have endeavoured to induce the British public to believe that any real desire for this solution exists in the Dominions, though even the shortness of political memories does not excuse his forgetting that Sir J. Ward brought forward a federal scheme in 1911 to the equal annoyance of Mr. Asquith and Sir W. Laurier. It is perhaps to be regretted that the scheme of Resident Ministers from the Dominions in London in close touch with the Foreign Office does not seriously commend itself to Mr. Hughes. If the Dominions are equal members of an Empire, it would seem to follow

that each should be represented at the heart of the Empire by Ministers to serve as effective links of communication, especially as Mr. Hughes is evidently satisfied that existing methods of giving information are unsatisfactory and inadequate. The one serious argument against the use of Ministers, in the case of Dominions which desire to participate in foreign policy, is the risk that the British Government might win the Minister's assent to some course, and claim that his views bound the Dominion, and this contention seems to me to imply a measure of unfair dealing on the part of Britain and of incompetence on the part of the Minister, which is frankly incredible. The true ground so far for the failure of the scheme to materialize is, I suspect, the fact that the Dominions have not been anxious, immersed as they have been in domestic affairs, to take upon them responsibility in foreign issues. It must be a boon to Ministers with so many difficulties to face as in Canada or the Commonwealth to be immune from defending or attacking the proceedings of the Saar Commission.

#### RESIDENT MINISTERS

Mr. Hughes's position regarding a Resident Minister, as shown by the fact that he took no steps to appoint one, is, I think, somewhat inconsistent with his insistence on effective communication as essential to the existence of the Empire. Wireless telephony is a thing of the future, perhaps for effective communication with Australia of a far distant future, and a Resident Minister discussing with the British Cabinet issues of foreign politics seems to me to promise more for effective Dominion knowledge of, and, when desired, intervention in, foreign affairs than Prime Ministers sending those interminable telegrams in which with persistent regularity each seems to fail to appreciate the other's point of view. If, as Mr. Hughes contends, and we all agree, frequent contact of Dominion Prime Ministers with the British Government is desirable, it seems to follow that constant and intimate contact of a



member of the Dominion Cabinet with that Government would be excellent.

Mr. Hughes, however, doubtless expresses Dominion feeling in his distrust of a Resident Minister, and, this being so, it is well to realize that the effective participation of the Dominions in moulding foreign policy is still a matter for perhaps a somewhat distant date. It would be premature to expect any change in communications which will render annual conferences possible in the near future, and even annual conferences are inadequate for effective participation in policy, as Mr. Hughes's own instances show. The conclusion is inevitable that, in the present conditions of political development, the Dominions are not yet desirous or able to take full responsibility for foreign policy, and this view is confirmed when we remember that not even the Commonwealth has attempted to maintain armed forces on a scale proportionate with such a responsibility, while in Canada expenditure on these matters has been reduced to nearly vanishing point.

For the time being it must suffice to give the Dominions such share in foreign politics as they care to assume, but there is one change to which Mr. Hughes does not allude, but which seems to merit consideration. That the Dominions should have separate representation in the League of Nations is a just recognition of their status, but, while the expression of divergent views on labour and commercial issues is natural and proper, is it necessary or desirable that on political issues several parts of the Empire should present different opinions without making a preliminary attempt by conference to arrive at a common policy? If there are differences of a fundamental kind, it is proper that they should be expressed; what seems to me desirable, and even demanded by common sense, is that before each Assembly meeting, the representatives of the various units of the Empire should confer together and seek to arrive at a common policy. It is idle to ignore the danger that separate membership of the League may otherwise tend towards the disruption of the Empire, and, having regard to

the state of Europe, it would be a very unwise policy that accepted the view that membership of the League should be a substitute for membership of the Empire.

## 28. THE DOMINIONS AND THE TREATY POWER

*To the Editor of THE SCOTSMAN, 16 March 1923.*

As the Prime Minister of the Commonwealth of Australia appears to share the popular view that Canada in her treaty with the United States as to the fisheries in the North Pacific has exercised the treaty power independently of the Imperial Government, it may be well to point out that this view rests on a complete misapprehension of diplomatic procedure. The treaty in question was signed by a Minister of the Canadian Government acting under full powers granted by the King, and it will doubtless be ratified formally in due course by an instrument authorized by His Majesty. In the issue of powers and in ratification His Majesty acts, and must act, on the advice of the Imperial Government, tendered through the Secretary of State for Foreign Affairs, and thus the Imperial Government controls absolutely the grant of the necessary power to conclude a treaty and its formal ratification. Normally and constitutionally<sup>1</sup> the Imperial Government will issue powers and ratify on the request of the Dominion Government, but it has still a right of control, and in any case it might postpone action until discussion with the other Governments of the Empire. This mode of procedure secures the maintenance of the Empire as a whole; if each Dominion, including the Free State, has an independent power to make treaties, the unity of the Empire is *ipso facto* hopelessly dissolved and its break-up merely a matter of time. The only innovation in the present treaty is the dispensing with the formal signature of the British Ambassador, which was never more in such cases than a formality, and has very properly been dispensed with in a matter exclusively Canadian in interest. Much of

<sup>1</sup> See No. 8, *ante*; Keith, *The Sovereignty of the British Dominions*, pp. 370-4.

the confusion of thought in this regard is due to confounding the international position of the Dominions generally with their peculiar position in regard to League of Nations deliberations, which has no application in matters outside that sphere. Canada might, of course, have made a direct agreement with the United States regarding the fisheries quite independently of the Imperial Government, but such an agreement would not have been a treaty and would have entailed no obligations on the Imperial Crown or the Imperial Government, and the objections to such incomplete agreements are recognized as strong both in Canada and the United States.

## 29. BRITAIN AND THE AUSTRALIAN DEBT

*To the Editor of THE SCOTSMAN, 14 December 1923.*

It is decidedly unfortunate that the Prime Minister of the Commonwealth in his laudable desire to make his stay in this country of immediate profit to Australia should have drawn an unfavourable contrast between the harsh terms exacted by the United Kingdom in respect of the liquidation of the Australian debt to Britain and those accorded to Britain by the United States. Mr. Bruce doubtless does not share the popular belief in Australia that Britain is in effect charging Australia two per cent. more for the money lent to Australia than she is paying the United States for that money, but it is inevitable that opinion in the Commonwealth should interpret his attack on the British Government in this sense.

Yet it cannot too clearly be recognized that the British debt to the United States was contracted in order to provide funds for allied Powers to whom the United States would not lend money to the amount requisite, and that Britain has received so far nothing from these Powers, and has a very problematic chance of receiving anything comparable to what she pays the United States. To make this fact an excuse for demanding a reduction of the interest on the loan to Australia is really

rather an amazing point of view. We readily recognize the great burden of debt incurred by Australia for the war, but Mr. Bruce seems to have forgotten the far greater burden imposed on Britain, and that no later than December 10 he assured us at Edinburgh that 'Australia particularly wanted nothing from us. They were doing very well at the moment. They had no unemployed, no problems that were worrying them.' We rejoice in this happy condition, and we may venture to hope that Mr. Bruce will not insist on aggravating in any degree the burden of taxation pressing on us at a time of widespread unemployment and misfortune.

Mr. Bruce's attitude is the more disappointing, because, as he has readily recognized, on Britain rests the burden of Empire defence, to which even Australia makes a relatively negligible contribution, especially in view of the fact that her defence involves great burdens, of which the proposed works at Singapore are only a minor feature. Nor does the Commonwealth contribute to the expense of the diplomatic service, though, very properly, Mr. Bruce has reiterated her demand for consultation and a voice in the decision of foreign affairs. Valuable as is the Commonwealth preference to British trade, it cannot seriously be set against the vital considerations of defence and participation in the direction of foreign affairs. If in future interest rates fall materially, there may be a case for reconsideration of the terms charged to the Commonwealth, but for that the time is obviously wholly premature, nor has the present Government the full authority to justify new terms.

### 30. IMPERIAL CONFERENCE RESOLUTIONS: THEIR EFFECT

*To the Editor of THE TIMES, 18 December 1923.*

Mr. Massey's doctrine, apparently also held by General Smuts, that undertakings by the Imperial Government at an Imperial Conference bind the British people, is surely at

once revolutionary and undemocratic. I cannot conceive of Canada or Australia sending delegates to any Conference on the understanding that, whatever these delegates might accept, would bind these Dominions, and the whole theory contradicts the whole history of the Imperial Conference.

A Government which concurs in any recommendation of an Imperial Conference undertakes, at the highest, no more than an obligation to bring the matter before its Parliament with a proposal to make the recommendation effective. It does not even come under an obligation to make acceptance of the proposal a matter of confidence, and the Parliament is clearly under no sort of obligation whatever to homologate the action of the Government, if it disapproves it. Needless to say, there is still less obligation on the nation, as a whole, or on a new Parliament in which the Government responsible for the actions of its delegates at the Conference has not a majority. Any attempt to negate this position would doubtless render Imperial Conferences impossible.

The suggestion has been made that, if the proposed new preferences are withheld, Dominion preferences may be revised. It may therefore not be out of place to recall that the original preferences were originally largely accorded of their own free will by the Dominions in recognition of the enormous benefits of Imperial protection, and that even now by far the greatest part of the burden of Imperial defence is defrayed by the comparatively poor population of the United Kingdom.

### 31. IMPERIAL CONFERENCE RESOLUTIONS

*To the Editor of THE GLASGOW HERALD, 28 December 1923.*

It is regrettable that Mr. Massey persists in his revolutionary doctrine that resolutions adopted at Imperial Conferences bind, not merely the Governments which concur in them, but the nations they represent. This view is wholly new; it flatly contradicts the theory and practice of the Conference from its

initiation, and as regards the Conference of 1923 it has been repudiated in the clearest manner by the Prime Minister of Canada. Nothing more undemocratic can be imagined than the idea that the Premiers of the Empire, in secret session, can bind their peoples, and not a single Dominion Parliament would ever send a Premier to London if it believed that he could when there enter into engagements which it would be bound to ratify. The Dominions rightly claim the final decision on all Conference agreements for their Parliaments, and they cannot deny the same right to the United Kingdom. Mr. Massey may have a grievance in that Mr. Baldwin did not ask Parliament to grant the preferences he promised before he risked an election, but that gives him no claim on the new Parliament or the people. It is difficult to see what advantage would accrue to the Dominions from the cessation of Conferences, which afford them the one real chance of influencing Imperial foreign policy, and it is absurd to argue that, because preference is not extended, the work of the Conference of 1923 is wasted. Unfortunately the question of preference seems to have obscured the great value of the resolutions on a wide sphere of other important interests, including communications and emigration, arrived at unanimously, and calculated to benefit alike the United Kingdom and the Dominions, without entailing sacrifices on any part of the Empire.

### 32. CANADA AND THE TREATY OF LAUSANNE

*To the Editor of THE TIMES, 10 April 1924.*

It is easy to understand Mr. Mackenzie King's reluctance to ask the Canadian Parliament to approve ratification of the Treaty of Lausanne, since such action would imply the undertaking by Canada of a definite and positive responsibility to render aid in case action became necessary under the Straits Convention, and, as the controversy over Article X of the League of Nations Covenant proves, Canadian opinion is united in the view that Canada should accept no obligation

to action which would fetter the decision of future Canadian Parliaments.

But the parliamentary discussions leave obscure the vital question whether Mr. King really holds that the Treaty of Lausanne, if and when ratified *simpliciter*, will not be binding on Canada because it was not signed by Canadian representatives acting *eo nomine* for Canada. This, of course, is the view suggested by the opinion of Mr. Doherty in 1919 when he explained to the Canadian House of Commons the doctrine of signature of treaties, and asserted that Canada could be bound only by treaties concluded in this manner. But I am unable to find any doctrine of international law on which this doctrine could be supported, and it appears clear that, unless and until international recognition is accorded to this new doctrine, a ratification without express exclusion of Canada must bind Canada in international law, as much as it binds the rest of the Empire. On this view, however, though ratification will bind Canada, it will remain open to Canada as freely as in the past to decide what steps she will take to assist actively in securing the observation of the Straits Convention, if the need should ever arise, and for all practical purposes this position should be satisfactory enough for Canada.

The alternative, the exclusion of Canada from ratification, would raise such grave issues that it may be assumed that Mr. King does not contemplate asking for such action.<sup>1</sup>

### 33. THE INTERNATIONAL STATUS OF THE DOMINIONS

(MORNING POST, 10 July 1924.)

The publication of the correspondence between His Majesty's Government and that of Canada regarding the signature and ratification of the Lausanne Treaty, and the intimation of the desire of the Irish Free State to secure the

<sup>1</sup> For Mr. King's acceptance of the views in this letter, see Keith, *Speeches and Documents on the British Dominions, 1918-1931*, pp. 335, 336.

appointment of a diplomatic representative at Washington, have raised once more in a somewhat acute form the problem of the measure of autonomy which is compatible with the continued unity of the Empire. The matter indeed would be simple enough if we could accept the doctrine, which is current in South Africa, and which asserts that the Dominions are States of International Law, whose unity depends on the allegiance to one sovereign and on that alone; but even General Smuts, who has carried to its farthest limits the doctrine of autonomy, has not officially adopted this position, and Mr. Massey has emphatically repudiated it. The situation is complex, and no simple theory is of value in attempting to explain it.

The dominant fact, however, is that the Dominions have as yet no international status other than that which they enjoy in virtue of their membership of the League of Nations. The terms of the Covenant of the League are sufficient to show that membership does not convert a Dominion into a State of International Law for all purposes; membership of the League gives a Dominion certain definite powers and duties, but, in matters not directly arising out of membership of the League, a Dominion retains its former position, and therefore is without international character. It is true that the treaties of peace, save that with Turkey, were duly signed by separate plenipotentiaries in respect of each Dominion, but, important constitutionally as this method of procedure was, it was internationally of no consequence. The signatures were for and in the name of His Majesty, and the authority to append them rested ultimately on His Majesty's Government in the United Kingdom; the significance of the mode of signature was essentially domestic, indicating that the Dominions by their participation in the war had acquired the right to consultation on all issues of foreign policy, while by signing the treaties they made it clear that they recognized their obligation actively to assist the United Kingdom in securing their due performance. The true nature of the signatures is admirably shown by the fact



that the important—though abortive—pact between the United States, France, and His Majesty regarding the defence of France was signed only by the Prime Minister of the United Kingdom, while express provision had to be inserted to render the obligations of the treaty binding only on the Dominions, if approved by their Parliaments.

In the light of these facts the controversy as to Lausanne admits of easy solution. The suggestion that any question of international law is involved is erroneous; no issue arises as to the possibility of Canada standing out from the peace or remaining at war with Turkey, while peace prevails as regards the rest of the Empire. The Canadian Government does not claim that the British ratification of the treaty does not make the treaty applicable to Canada, or that Canada is an independent State; what it asserts is something very different and perfectly reasonable, and it is a misfortune that its attitude should have been so widely misunderstood. Canada was not given the chance of being represented during the negotiation of the treaty, and therefore, very naturally, the Dominion Government declined to consent to the treaty being signed in respect of Canada separately, or to express concurrence in the ratification of the treaty, while taking no exception to such action as regards ratification as His Majesty's Government might determine upon.

The result, therefore, is that the treaty through ratification becomes binding on Canada as far as international law is concerned, but that in regard to it Canada stands in a different attitude constitutionally than to the earlier treaties of peace. In the case of those treaties she accepted full responsibility to play her part in the execution of their provisions, a fact strikingly illustrated by her efforts to secure the modification of the grave burdens imposed by Article X of the Covenant of the League of Nations. In the case of the Treaty of Lausanne she has expressly stated that she holds that the obligations imposed by the treaty, including the Straits Convention, are essentially incumbent on the United Kingdom. In the event,

therefore, of any breach of that Convention Canada remains morally and constitutionally free to decide to what extent, if any, she will assist the United Kingdom to vindicate the terms of the treaty. From the point of view of the domestic relations of the Empire the distinction is of great practical importance, but it has no significance for international law. The position of the Irish Free State in this regard is identical both in law and in fact. The Treaty of Lausanne binds the Free State, but constitutionally the Free State remains free to determine how far she will accept the duty to participate actively in dealing with any breach of the Convention.

The attitude of Canada and the Free State in this regard affords a practical solution of what *prima facie* is a grave difficulty, the possibility of carrying on an Empire foreign policy without deadlocks or destroying the unity of the Empire. It is plainly impossible, under present conditions of feeling in the United Kingdom and the Dominions, for British relations with European Powers to be controlled by a truly Imperial body, and the only practical solution lies in consultation, and, if agreement is not possible, in the conclusion of treaties by the Crown on the authority of the Government of the United Kingdom, subject to the constitutional understanding that it remains for the Dominions to decide, if and when the cause arises, to what extent they will actively assist the United Kingdom. How far it may prove possible in concluding treaties of a political character, as opposed to commercial treaties, to make clear to what extent they are applicable to the Dominions is a matter remaining to be explored; but it is not unlikely that in practice the attempt would prove unfruitful and might tend to endanger Imperial unity.

#### SEPARATE MINISTERS

The same danger is far more directly threatened by the question of the appointment of a minister plenipotentiary of the Irish Free State at Washington. The Irish demand rests on a very strong basis, the promise given by the Treaty of

December 6, 1921, of a status equivalent to that of the Dominion of Canada, for on May 11, 1920, Mr. Bonar Law announced in the House of Commons the conclusion of an arrangement between the British and Canadian Governments for the appointment at Washington of a minister plenipotentiary to have charge of Canadian affairs. It is true that Canada has hitherto refrained from making a recommendation to the King under this arrangement, but this is not, strictly speaking, relevant, and it is difficult except on very technical grounds to refuse the Free State the benefit of a similar appointment, provided, of course, that the United States concurs in it.

There are, of course, obvious objections to the procedure proposed, as well as considerable difficulty in estimating the manner in which the proposal would operate. The appointment, according to the agreement with Canada, would be intended to operate in such a manner as not to violate the diplomatic unity of the Empire, and the Government of the United Kingdom would be responsible for the advice to make the appointment tendered to the Crown. The minister plenipotentiary would be empowered to represent His Majesty at Washington, but not, like the British Ambassador, generally, his sphere being restricted to matters of purely Canadian or Free State concern, and on these he would take his instructions direct from the Canadian or Free State Government. The immediate difficulty arises as to the authority to determine what matters were of purely Canadian or Free State concern, and the relations of the Ambassador to the Minister in respect of questions which might have, or be held by the British Government to have, an Imperial interest. It is patent that a commercial arrangement between the United States and Canada or the Free State is precisely the sort of question with which a Minister representing either of these territories would be expected to deal, and equally plain that any such agreement might deeply affect Imperial interests generally, as was the case with the reciprocity agreement of 1911. Further confusion may be expected if and when Australia or

South Africa feels it incumbent to ask for a Minister of its own, and the United States Government may be excused if it feels no enthusiasm for any such splitting up of British representation, even unaccompanied by any suggestion of recognition of the Dominions as distinct units of international law.

On the other hand must be set the fact of the natural Canadian feeling that, as the bulk of the Embassy business in the United States is connected with Canadian affairs, it is desirable that these matters should be dealt with by a Canadian, whose responsibility is direct to the Canadian Government. As matters stand, the Dominion Government communicates direct with the Ambassador, and he acts normally in accord with Dominion wishes, but he is responsible to His Majesty's Government and is not a servant of the Dominion. Useful service could doubtless be rendered by a Canadian Minister who was willing and able to co-operate effectively with the British Ambassador; but even diplomats are often deficient in tact, and the reluctance of several prominent Canadians to accept the post indicates effectively the delicacy and complexity of the position which such a Minister must occupy at Washington.<sup>1</sup> The situation would be far more serious if the Minister represented a Government which had no desire to work cordially with the British Government, and if his appointment were pressed with a view to establish ultimately the independent status of the territory which he represented.

One misunderstanding should in any case be avoided. The appointment of a Dominion Minister would in no wise increase the power of the Dominion in treaty matters. Such a Minister could not negotiate or sign for the Crown any treaty without the express authority of the British Government as well as his own Government, and any treaty so signed could only be ratified with like assent. He might, of course, act as the intermediary for the conclusion of informal agreements, not ranking as treaties, between his own Government and

<sup>1</sup> The post was only filled by Mr Vincent Massey after the Imperial Conference of 1926.

that of the United States, but for this purpose diplomatic status is unnecessary; such agreements have in the past been made without diplomatic intervention, their existence is recognized and approved by the Imperial Conference of 1923, but it is made clear that they have no true international character.

#### 34. THE LEAGUE OF NATIONS COVENANT AND THE BRITISH COMMONWEALTH

*To the Editor of THE MORNING POST, 16 December 1924.*

The notification of His Majesty's Government of November 1924, now made public, that it does not regard the League of Nations Covenant, or any conventions concluded under the auspices of the League, as applicable to the relations *inter se* of the various parts of the British Commonwealth, raises questions of the utmost importance on which further enlightenment from the Government is urgently required.

In the first place, is this view shared by the Governments of the Dominions other than the Irish Free State, which in point of fact has definitely and consistently adopted the opposite point of view? In particular, what is the opinion of the Dominion of Canada, having regard to the fact that the status of Ireland is expressly defined in the Treaty of 1921 by that of Canada? Obviously there has been ample time to obtain the views of the Dominions on this head, and, if they share the British view, then the intimation to the League of Nations would have acquired infinitely more force if supported by their authority.

In the second place, on what grounds is the British claim based? The Covenant certainly lends no direct assistance to the claim, however reasonable it seems and however anxious we are to maintain it. Moreover, it must be admitted that in conventions concluded under the auspices of the League express provision has been made to exclude from their operation the relations *inter se* of the parts of the Empire, as in Article 23 of the Statute on the International Régime of Maritime Ports.

If express provision was requisite in such conventions, was it not requisite in the Covenant itself? And is the British view really compatible with the separate membership of the League accorded to the Dominions and India?

### 35. THE LOCARNO PACT

*To the Editor of THE TIMES, 20 October 1925.*

Article 9 of the Security Pact provides that it shall impose no obligation upon any of the British Dominions or on India unless the Government of such Dominion or of India signifies its acceptance thereof. There is thus a curious deviation from the terms of the Anglo-French Treaty of June 28, 1919, for Article 5 of that instrument referred only to the Dominions and required approval of that instrument by their Parliaments in lieu of acceptance by their Governments. The change of form may conceivably be motivated by the addition of India, in itself clearly justifiable, but otherwise it can hardly be regarded as satisfactory. It is clear that any acceptance of obligations under the treaty must be based on the most formal sanction of Dominion Parliaments. The fact was recognized in 1919 and dictated the terms of the treaty of that year, and there seems no adequate grounds for adopting a form which suggests that it rests with the executive governments of the Dominions to decide the question of the acceptance of the Pact. The Dominions have consistently asserted the rights of their Parliaments in treaty matters, the innovation of 1919 had their support, and departure from it seems to require explanation.

### 36. THE DOMINIONS AND THE LOCARNO PACT

*(November 1926: J.C.L. viii. 125-6.)*

The conclusion of the Locarno Pact has evoked from the Dominions the normal response. In New Zealand the Prime Minister, following closely in the footsteps of Mr. Massey, has

asserted the intention to secure approval of the Pact by Parliament in due course, and has explained the fact that the Pact was not signed by a New Zealand representative for the Dominion on the score that Parliament had not been consulted, and that such a step would have been improper. The argument is not wholly satisfactory on logical grounds; the signature of the treaty of peace with Germany was given before Parliament was or could have been consulted; but clearly New Zealand could not well have acted alone. In the other Dominions this eagerness to accept British policy has not been evinced. Both Mr. Mackenzie King and Mr. Meighen declined to commit themselves to expressions of intention during the electoral campaign, and Mr. King's warm congratulations to Sir Austen Chamberlain on his K.G. must not be taken as signifying more than admiration for the achievement of the Pact, and certainly not any desire to ask the Dominion Parliament to assume responsibility under it. Mr. Meighen indeed has made any such action extremely difficult by propounding, under the fire of criticism for his party's share in adopting compulsory military service in the late war, the doctrine that Canada should not take part in any war by dispatching troops unless and until a decision to that effect has been obtained from the people at a general election held for the purpose. The doctrine has not, it is plain, been received with much enthusiasm by many of his English supporters, and it is clearly intended to secure the Conservative party a better chance of success in Quebec by assuring the habitants that any participation of Canada in future wars will be very fully authorized. It is, however, clear that it will be hard for any political leader in future to repudiate the doctrine and that in these circumstances it will be more and more difficult for Canada to accept international obligations with any assurance of being able to honour them effectively when the time comes. Canada, it will be remembered, took no step to accept obligation under the treaty with France of June 28, 1919, to secure the protection of France in case of German attack, which fell through

owing to the abstention of the United States, and every consideration of prudence suggests that her action as regards the Locarno Pact will follow that model. It is equally unlikely that General Hertzog, who recognizes the merit of the Pact, will seek to induce his followers to reverse the policy of abstaining from obligations in respect of European politics, and there is no unanimity even in governmental ranks in the Commonwealth as regards the wisdom of bringing Australia formally under any obligation.

General Smuts has not unnaturally shown anxiety lest the Locarno precedent may not lead to the various parts of the Empire going their several ways, and has pointed to the danger of the time coming when there will not be the feeling of the obligation of each part to assist in defending the right of any other part. More pessimistically it has been contended that Mr. Merriman was right in holding that the creation of the League would lead to the disintegration of the Empire. There is no doubt that the fact that Britain was driven to separate action is really to be regretted, but the defence made for her decision by the Government is clearly unanswerable. It was felt—and the reasons adduced seem convincing—that opportunity should be taken of the chance of bringing European relations back to something approaching normality, and it was obvious that the Dominions were not in a position to accept responsibility in the matter.

### 37. APPEALS FROM THE IRISH FREE STATE

*To the Editor of THE MANCHESTER GUARDIAN, 13 April 1926.*

Recent discussions of the desire of the Irish Free State to limit appeals to the Privy Council, and not least the observations of the Lord Chancellor,<sup>1</sup> appear to ignore the real value of the appeal. Its importance lies not in the decision of difficulties arising out of the ordinary law, but in disposing of constitutional questions. If it has been accepted so long by Canada, it

<sup>1</sup> Lord Cave; see Keith, *Responsible Government*, ii. 1090.



is because it is felt that in a Dominion with two great races of different language and religious outlook a perfectly impartial board is an ideal court of final appeal. Similarly, in the Union of South Africa the appeal was allowed to stand, when union was brought about, that there might be a court which would be swayed by no local racial influences.

So in the case of the Irish Free State the one appeal of value is that on constitutional issues, and this is the appeal which the Free State Constitution leaves beyond the power of the Free State. Appeals lie only from the Supreme Court of the State, and it is within the power of the Parliament under Article 66 of the Constitution to prevent appeals on other matters being dealt with by the Supreme Court, but it cannot affect constitutional appeals. As long as this principle is recognized, it seems a matter of indifference what the Free State does as regards appeals in ordinary cases, and denunciations of its action seem wholly out of place in view of the clear intention of the Constitution and of the approval accorded to it by the Imperial Parliament.

### 38. THE CANADIAN CONSTITUTIONAL CRISIS OF 1926

(MANCHESTER GUARDIAN, 8 July 1926.)

Lord Byng by refusing the dissolution asked for by Mr. Mackenzie King has challenged effectively the doctrine of the equality of status of the Dominions and the United Kingdom, and has relegated Canada decisively to the colonial status which we believed she had outgrown.

His action affects not Canada alone, for Canada is by constitutional law solemnly asserted in the Irish Treaty to be the model for the Irish Free State, and despite the provisions of the Irish Constitution the Governor-General is now legally empowered to disregard, and constitutionally capable of disregarding, the advice of the Free State Ministry. The matter, then, is one far transcending local politics.

Lord Byng's action is, of course, absolutely constitutional—whether wise or not we need not consider—if Canada has the same status as the States of Australia or her own provinces. Doubtless it is the modern usage for a Governor to hesitate long ere he refuses ministerial advice and prefers his own judgement to that of the head of the Government. The Governor of New South Wales lately consented to add twenty-five members to the Upper House on the advice of a Ministry, which had no mandate to abolish that body and which was sustained by a slender majority in the Lower House. It is true that, when some of the newly-made honourable members belied their style by refusing to vote for their own extinction, he declined to add further members. But he was encouraged to take this step because his Ministers would not advise him to dissolve, having a natural hesitation to ask the public to judge their manœuvre, and it is significant that he made no attempt to dismiss them from office as would have been their fate in earlier days.

But Mr. King's whole contention against Lord Byng and Mr. Meighen, who becomes technically bound to defend the former's decision, is that the colonial status is outworn, and that the Governor-General's action ought to be based on the principles observed in the United Kingdom. The issue, therefore, at once arises whether on British principles<sup>1</sup> Lord Byng's action can be sustained.

Mr. Asquith's dicta form the chief support of those who thus defend the Governor-General. Now it is clear that Mr. Asquith did contemplate the possibility of the King refusing a dissolution if asked for by Mr. MacDonald, at least until he ascertained whether an alternative Government was not available. This doctrine when enunciated appeared to the writer wholly contrary to constitutional usage, and the dissent which I then expressed appears to me to have been substantiated beyond doubt by the action of the King when the occasion arose. Under colonial usage a dissolution would not have been

<sup>1</sup> See Ridges, *Constitutional Law of England* (ed. Keith), pp. 146–8.

accorded until both Mr. Asquith and Mr. Baldwin had been asked to form ministries and had failed. But His Majesty accepted without demur or delay his Prime Minister's advice thereby affirming the fundamental principle on which rests our loyalty to the Throne—that the sovereign governs as a purely constitutional monarch. That occasions may be imagined where sovereigns would have to disregard such advice may be admitted; that such will ever arise in this country is most improbable, and no one seriously suggests that in like circumstances in the United Kingdom there would have been any hesitation on the part of the King in granting a Prime Minister the dissolution for which, after full consideration, he formally asked.

Moreover, the whole weight of Dominion precedent, since the Imperial Conference of 1911 when first the Dominions appeared on equal terms with the United Kingdom, tells directly against Lord Byng's decision. In 1914 Sir R. Munro Ferguson in Australia was confronted by the demand from a Ministry which had a majority of one in the Lower House and was in a hopeless minority in the Upper House, that he should grant it, not merely a simple dissolution of the Lower House, but a dissolution of both Houses. Such a demand on ordinary colonial principles would have been rejected without hesitation, but the Governor-General gave effect to the new status of the Commonwealth. He accepted the advice of his Prime Minister despite the objections of the Opposition. The people by their vote condemned the Prime Minister's action, but it was recognized that the Governor-General's action was based on a fundamentally sound principle, and the only one compatible with national status.<sup>1</sup>

Throughout his term of office the Governor-General adhered steadily to this line of conduct, though well aware that if matters had been treated as open to the exercise of his personal discretion, he could not have homologated such a de-

<sup>1</sup> Keith, *Imperial Unity*, pp 106-12; *War Government of the British Dominions*, pp. 246, 251.

cision as that of Mr. Hughes to remain in office, after a formal resignation in 1918, after a solemn pledge not to retain power if his compulsory service proposals were rejected at the referendum of December; and the Governor-General, it will be remembered, was of long parliamentary experience, and thus he could, even far more fully than Lord Byng go into the fundamental issues involved in Dominion status.

The practice in South Africa and New Zealand since 1911 has been entirely in accord with British usage, and it is a matter for serious regret that Lord Byng should thus have ignored the new status of the Dominions as coequal members of the British Commonwealth of Nations.

The result of his false step is seen in the deplorable irregularity in which he has been compelled to acquiesce in the administration of the departments of state by persons who had not been formally appointed as Ministers, in order to avoid the necessity of their absence from the House of Commons pending their re-election.

Whatever may be said of Lord Byng's action generally in this matter, it is clear that he has failed in the fundamental duty of securing the observance of the law and customs of the Constitution.<sup>1</sup>

### 39. THE CANADIAN ELECTION

*To the Editor of THE SCOTSMAN, 1 September 1926.*

I would suggest that two reasons go far to account for the turnover of votes in Ontario in favour of Mr. Mackenzie King. In the first place, Mr. Meighen not merely wounded the feelings of many Conservatives by his unwise surrender to the extreme demands of Mr. Patenaude as regards the necessity for a general election before Canada participated in any British war, but he committed himself to the doctrine, which General Hertzog in the Union of South Africa has applied

<sup>1</sup> Mr Mackenzie King accepted the arguments of this letter; see Keith, *Speeches and Documents on the British Dominions, 1918-1931*, pp. 152, 153.

with damaging effect to British trade, of the necessity of placing the British preference on a strictly reciprocal basis. Many Conservatives feel that this is a poor return for the protection of the British fleet and the services of British diplomacy, and doubtless some at least expressed their British affiliations by their vote.

Secondly, the constitutional issue was unwisely represented by Mr. Meighen's supporters to raise an inter-Imperial question. This was never the case, and Mr. Amery denied with much emphasis any interest in Lord Byng's decision. The question was simply one whether, under the status of Canada as a co-equal member of the British Empire, the Governor-General had, or had not, a discretion to refuse a dissolution. Mr. King's speech at Ottawa on July 23, which was distributed broadcast over Canada, presented a complete case against Lord Byng's action, and to the end Mr. King stressed the constitutional issue. He had on his side the absolutely clear declaration of Sir Robert Borden in his *Constitutional Studies* in precisely the same sense, and Sir Robert Borden has just reputation among Conservatives, not merely as a great leader, but as a constitutional authority of high rank, and the pronouncement of his former chief unquestionably told against Mr. Meighen.

Lord Byng's action was, of course, prompted merely by his desire to serve Canada, and no one has been more generous in his eulogy of his character and motives than Mr. King; but he lacked experience of politics and parliamentary government, and the record of Lord Novar's handling of even more delicate and difficult situations as Governor-General of the Commonwealth of Australia proves how valuable such experience is to one who has to represent the Crown in an oversea Dominion. In any case, however, it may safely be said that, as Lord Byng was the first Governor-General of Canada to refuse a Prime Minister a dissolution, so he will be the last. It is useless to ignore the evolution of the Dominions, and to apply to Canada the principles which may still be effective as regards Victoria or Newfoundland.

## 40. THE IMPERIAL CONFERENCE OF 1926

(GLASGOW HERALD, 22 November 1926.)

The fundamental proposals for change in the constitution of the Empire were presented to the Imperial Conference by the Union of South Africa and the Irish Free State. As was inevitable, these have failed of acceptance as the outcome of the resistance to hasty change of Canada, the Commonwealth, and New Zealand. It is however, no longer argued, as by Mr. Hughes in 1921, that the Dominions have nothing to desire; an expert committee will submit recommendations as to the vital question of the power of the Imperial Government to prevent Dominion legislation; the territorial restrictions imposed on Dominion legislation; and the paramount power of the Imperial Parliament, reasserted as regards the Irish Free State in 1922, to legislate for the whole Empire. The very important issue of merchant shipping, in which Imperial control has been retained down to the present, will similarly engage the attention of a sub-committee. Even on the appeal to the Privy Council nothing has been actually conceded, and the Irish Free State has been induced to withdraw for the present its demand for the abolition of the appeal. If the theoretic defence of this attitude of caution is sought, it may be found in the agreement that 'the principles of equality and similarity appropriate to status do not universally extend to function'.

None the less a certain amount of progress has been made. The change in the royal title is obviously an improvement, and out of the unfortunate episode of Lord Byng's refusal of a dissolution to Mr. Mackenzie King has resulted a definite declaration that the Governor-General of a Dominion is to hold in all essential respects the same position in regard to the administration of public affairs as is held by the King in Great Britain. The decision is unquestionably wise, but it is by no means clear that it involves the further proposal that the

Governor-General should no longer act as the channel of communication between the Imperial and Dominion Governments. Fortunately the latter resolution is facultative, and it may be doubted if the Dominions in general have any desire to see the existing plan suspended or to welcome the appointment therein of any other Imperial officer to act as a channel of communication. The reduction of the office of Governor-General in importance would undoubtedly render it harder than ever to find men of ability and standing to undertake the duties. In so far, of course, as the arrangement may meet Irish wishes, it is clearly innocuous.

In the sphere of foreign relations the Imperial Government has secured an important victory. The Irish Free State claimed that the treaties concluded by it with the United Kingdom were matters of true international concern and therefore registered them with the League of Nations. The Imperial Government denied this doctrine, insisting that relations between the several parts of the Empire must be deemed not to lie in the sphere of the League. It is now agreed that general treaties should now be regarded as inapplicable between different parts of the Empire unless expressly so stated, and that where international agreements are to be applied between parts of the Empire, the form of a treaty between heads of States should be avoided. This may not prove easy in practice, but it is clear that a distinct defeat for the Irish Free State must be recorded. On another vital issue no concession seems to have been made to Dominion demands; it has been claimed that full powers to enter into treaty arrangements with foreign States should be issued by the King to Dominion representatives on the advice of the Dominion Governments only, without the intervention of the Imperial Government, and that ratification should similarly be expressed on Dominion advice alone. Such a procedure would, however little its advocates realize it, mean an end to the unity of the Empire, and it is clear that the Conference preferred the wiser course of urging greater consultation

among the members of the Empire and not independent powers of action.

It has therefore amplified the obscure arrangements of 1923 as to treaties by making it incumbent on every part of the Empire, when it desires to make a treaty with any foreign State, to consult the other parts and to allow them to decide whether or not they are interested, and wish to participate in negotiations. The procedure will secure that the diplomatic representatives of the Irish Free State and Canada at Washington will be in no doubt as to their duty of consulting His Majesty's Ambassador; the correlative duty of consulting the Dominions has long been recognized in practice as in theory.

Another decision of value is the determination to abandon the use of the term 'British Empire' in the conclusion of treaties, and make them instead in the name of the King, with specific mention in every case of the parts of the Empire affected. It is recognized that at International Conferences the exact mode of the representation of the Empire must be determined by agreement, and must depend in part on the consent of other Powers; but the duty of seeking to secure that foreign States shall recognize the propriety of the separate representation of the Dominions is now clearly imposed on the Imperial Government as still the dominant factor in Imperial foreign policy.

Of effective means to secure co-operation between the United Kingdom and the Dominions nothing has yet been devised, and, if the Conference has resulted in the fortunate decision that no part of the Empire shall accept the compulsory jurisdiction of the Permanent Court of International Justice without further consultation, failure must be recorded regarding acceptance of responsibility by the Dominions under the Locarno Pact. They have congratulated His Majesty's Government and have left it alone to bear the grave burden involved. Nothing else could be expected, but the grave fact remains that we are still without any real machinery for securing the adoption of a truly Imperial foreign policy.



#### 41. THE IMPERIAL CONFERENCE AND THE GOVERNOR-GENERAL

*To the Editor of THE SCOTSMAN, 26 November 1926.*

It is clear from the expressions of opinion in the Dominions on the conclusions of the Imperial Conference on inter-Imperial relations that the resolution regarding the position of the Governor-General is that most susceptible of misinterpretation. Mr. Baldwin's reply in the House of Commons yesterday should have removed one misapprehension. The Governor-General at present is the only effective means by which a Dominion may be prevented from passing legislation inimical to Empire interests, and unless and until the Imperial Government decides to surrender absolutely the right to intervene—e.g. to prevent a Bill for secession on the part of the Union of South Africa or the Irish Free State being passed—the Governor-General must remain charged with the duty of carrying out the wishes of the Imperial Government.

The real significance of the new suggestion has relevance to the field of foreign affairs. The opinion has been put forward that the Governor-General should act as an essential link in relations between the Imperial and Dominion Governments in this regard. But Sir Robert Borden and, it is now clear, Mr. Mackenzie King hold that it is desirable not to combine in the hands of one officer the distinct functions of a diplomatic agent and the constitutional head of the Dominion Government. The resolution of the Conference, therefore, leaves it open for Canada or any other Dominion which so desires to cut out the Governor-General as a channel of correspondence in such cases, and to communicate direct with the Imperial Government. If desired, the Imperial Government may send to Ottawa or other capital a High Commissioner or other representative to keep in touch with Dominion views on foreign affairs, in much the same way as Dominion High Commissioners in London keep in touch with

British views. There is clearly nothing in this objectionable, though some Dominions<sup>1</sup> may not wish to limit the Governor-General's functions, for the present at least.

The agitation which appears to have arisen in the States of Australia lest the resolution should prejudice their position *vis-à-vis* the Commonwealth is clearly based on a complete misunderstanding. The Conference had not the right, and assuredly had not the wish, to interfere in any degree with the affairs of the States. Any change must rest on their own action.

#### 42. THE SIGNIFICANCE OF THE IMPERIAL CONFERENCE

*To the Editor of THE SCOTSMAN, 16 December 1926.*

I do not imagine that many people will be inclined to share the view of the work of the Imperial Conference expressed by Mr. R. Macdonald, M.P., as reported in your issue of to-day. The idea that a meeting of Prime Ministers sitting in private should dream of separating the Empire into seven Crowns, without mandate from their Parliaments, seems incredible; and, whatever the view of General Hertzog may be, no fundamental change in Imperial relations can be accomplished without the deliberate assent of the Parliaments of the United Kingdom, Canada, and Australia.

Mr. Macdonald's assertion that in future the King will not even consult British Ministers regarding communications from Dominion Governments cannot be supported by anything in the Conference resolution. It contradicts flatly the definite assertion by Mr. Baldwin in the House of Commons on November 25 that Governors-General would continue to exercise the power of reservation of Bills for the signification of His Majesty's pleasure, and it would place the King in an

<sup>1</sup> Australia made the change only after the appointment of Sir Isaac Isaacs as Governor-General, and New Zealand and Newfoundland retained the old arrangement.

impossible position as regards his British Ministers. The union of the Crowns of Hanover and Great Britain was possible only because the King of Hanover was not a constitutional monarch. But apart from constitutional issues, has Mr. MacDonald considered what his doctrine would mean in its bearing on Dominion loans as trustee securities? In conferring on these loans the great benefit of admission to this status, the Treasury has properly insisted on requiring a formal admission by each Dominion Government that any law impairing the security of investors in these loans would properly be disallowed. On the new doctrine this assurance is rendered valueless, and every holder of Dominion loans is compelled to face the possibility of an impairment of his rights by unfettered Dominion legislation. It is idle to argue that the safeguard is unnecessary. The Treasury down to the present has refused admission of provincial loans in Canada to the list of trustee securities on the score of the impossibility of Imperial disallowance of such Acts.

That disallowance of Dominion legislation is now out of harmony with Dominion development I have long argued, but it cannot be surrendered without some security for adjusting difficulties which may arise from its disappearance; and it seems to me that a very strong case exists for the suggestion, which I made ten years ago,<sup>1</sup> that differences of opinion between Empire Governments which are incapable of settlement by correspondence or discussion at a Conference should be referred to arbitration; an obvious tribunal is available in the Judicial Committee of the Privy Council, with full Dominion representation.

#### 43. CONSTITUTIONAL ISSUES IN CANADA

*To the Editor of THE SCOTSMAN, 15 March 1927.*

The constitutional issues in Canada, the Conservative view of which is very clearly set out in the message from your

<sup>1</sup> Keith, *Imperial Unity*, pp. 165, 166, 388. See No. 117, *post*.

Ottawa correspondent in your issue of to-day, are so important that a comment based on constitutional practice may be admissible. The alleged 'gentlemen's agreement' has been declared by Mr. Mackenzie King a complete fabrication, and it need only be added that, since the well-known case of Sir W. Ellison-Macartney in Tasmania in 1914,<sup>1</sup> it has been clearly unconstitutional for a Governor to make any bargain with Ministers as to the terms on which they are to remain in office, and it is quite unfair to attribute to Lord Byng a breach of a clear rule of constitutional usage.

The vital question of Mr. King's action in advising Lord Byng to consult Mr. Amery appears to me to have been seriously misunderstood. No one could deny that Lord Byng was an Imperial officer subject to the royal instructions conveyed through the Secretary of State. The point at issue was, What did these instructions enjoin in the case where a Prime Minister asked for a dissolution, and presented for approval an Order in Council for that purpose? Was it Lord Byng's duty to investigate the political situation for himself, and decide on his own responsibility what was best for Canada? Or could he follow the British practice—recently signally illustrated by the immediate acceptance by His Majesty of Mr. Ramsay MacDonald's advice in 1924—and act on the advice of his Ministers? The custom of the Australian States supported the use of a personal discretion, but no Canadian Governor-General since federation had ever declined advice. Lord Byng was without political experience, and it appears to me that Mr. King acted with much common sense in advising him, before taking a decision which, as he rightly anticipated, would have very far-reaching consequences, to ask the Secretary of State what the royal instructions really meant. I confess that, while I have always held that Lord Byng erred in his decision, it appears to me that much of the responsibility really rests with a system under which a Governor-General is sent out without any clear instructions as to the place which

<sup>1</sup> Keith, *Imperial Unity*, pp. 99-104.

he is to occupy in the structure of government. Happily, the resolution of the Imperial Conference of 1926 should effectively prevent any Governor-General in future being placed in so uncomfortable a position as was Lord Byng.

#### 44. CANADA AND THE CONSTITUTION

*To the Editor of THE SCOTSMAN, 10 May 1927.*

May I correct a misconception of my view of Lord Byng's action which appears from your Ottawa correspondent's message to be held by Mr. Cahan, K.C.? Mr. Cahan suggests that it is proposed that 'at all times and under all circumstances the Prime Minister is to have a dissolution upon request'. What, however, I have advocated since 1915,<sup>1</sup> and what has now received the *imprimatur* of the Imperial Conference of 1926, is something very different. It is that the Governor-General of a Dominion should in his official actions adopt the principles accepted by the Crown in the United Kingdom. This disposes at once of the dilemma posed by Mr. Cahan, when he argues that on the new rule a Prime Minister who obtained a dissolution and was defeated at the polls could still advise and receive another dissolution. No one, I imagine, seriously contends that His Majesty could constitutionally grant a second dissolution in such circumstances, even assuming that a Prime Minister was so lacking in public duty as to suggest it. On the other hand, the action of the King in respect of Mr. Ramsay MacDonald's request for a dissolution is a striking confirmation of the rule that it is not proper for the Crown to refuse to give the electorate an opportunity of pronouncing its verdict on disputed issues. If Lord Byng disapproved Mr. King's avoiding a parliamentary vote, he might properly have pressed him to wait for a decision before dissolving, but, in my view, he was not entitled to refuse to allow him to appeal to the people, whose verdict

<sup>1</sup> Keith, *Imperial Unity*, pp. 97, 590.

ultimately, it must be remembered, was given unmistakably in his favour.

I must add that my criticism of Lord Byng was based not merely on his refusal to grant a dissolution to Mr. King, but on that refusal coupled with the grant to Mr. Meighen. Colonial precedents would have justified the refusal to Mr. King, had Mr. Meighen been able to form a Government and command a majority in the Commons. When Mr. Meighen found that this was impossible, and when the Commons actually censured him, he should clearly have advised Lord Byng to invite Mr. King to resume office on the understanding that he would have a dissolution, and his failure thus to act and his asking in lieu for a dissolution placed Lord Byng in a most unfortunate position and one without any real colonial parallel.

#### 45. NATIONALITY IN THE EMPIRE: DOMINION CITIZENSHIP

(MANCHESTER GUARDIAN, 1 *June* 1927.)

Lord Balfour in his address of January 26, 1927, at Edinburgh insisted that the essential characteristic of the Report on Inter-Imperial Relations of the Conference of 1926 was the enunciation of a dominant principle, that of the equality of the self-governing parts of the Empire, and he declined to express any opinion on the working out in detail of that fundamental rule. The debates on the Report in the Canadian and Union Parliaments have proved the difficulty of the undertaking, but they have also made it clear that matters will not be left indefinitely in their present condition. On the other hand, discussion has brought to the surface the serious issues affecting British nationality which might be compromised by any hasty action, and has revealed a gratifying insistence that national status shall not be permitted to interfere with the position of Dominion citizens as British subjects.

The true doctrine on this topic was established as far back as 1921 by the Canadian Parliament when it passed an Act

to define Canadian nationals. The immediate cause of the enactment was the creation of the Permanent Court of International Justice, for under its constitution each member of the League has the right to nominate two of its nationals as candidates for election to membership of the Council. Clearly under this provision, if Canada desired to make nominations, she must have defined her nationals, and she took steps to do so in a simple and effective manner. The status of national was given to all Canadian citizens in the sense defined in the Immigration Act of 1910, to the wives of such citizens, and to persons born out of Canada whose fathers were Canadian citizens at the time of their birth, while due provision was included for the renunciation of such citizenship. Nothing, however, was provided to affect in the slightest degree the status of Canadian citizens as British subjects, and in the South African Nationality and Flag Bill of 1925, and seemingly also in the Bill now before the Union Parliament, the same principle is adopted.<sup>1</sup> Dominion citizenship is a matter of differentiation within the greater whole of British nationality; it is essentially a matter for independent regulation by each Dominion, while British nationality, as common to the Empire, cannot be altered save with the assent of all the self-governing members of the Empire. Citizenship in any Dominion confers special privileges, especially that of the right to enter, but it need not be made the basis of political rights to the exclusion of the wider test of British nationality. Canada and South Africa do not seek thus to differentiate, agreeing herein with the view of the United Kingdom. It is otherwise in the Irish Free State, which denies political rights to non-citizens, though its citizens as British subjects enjoy in the United Kingdom and other Dominions full political privileges. The United Kingdom has so far declined to establish a favoured class of British citizens as opposed to British subjects. Yet the matter has been discussed, especially in Scotland,

<sup>1</sup> Citizenship as a basis for the franchise was only adopted in the Union in 1931.

which finds that its population is slowly but surely being affected both in racial composition and religion by the influx of citizens of the Irish Free State.

Nothing, of course, short of a declaration of complete independence can alter the fact that all citizens of the Dominions are British subjects. This was laid down in Calvin's Case under James I, when it was held that on the union of the Crowns of Scotland and England Scotsmen born after the accession to the English throne of their king were born in the allegiance of the King, and were thus subjects of England as of Scotland. Similarly, it was ruled that Hanoverians born during the union of the Crowns were British subjects, though the kingdoms were completely distinct in government, and lost their allegiance only when, on the accession of Queen Victoria, Hanover ceased to be connected with the British Crown. For the Dominions the fact has long had one great advantage, though probably it has seldom been fully realized. As British subjects, citizens of the Dominions are entitled to whatever privileges are secured in commercial treaties for British subjects, without regard to the fact whether the Dominion has agreed that the treaty in question shall apply to her territory or not. Thus, for example, under Article I of the Anglo-Japanese Treaty of 1911 Australians are at liberty to enter, travel, and reside in the Empire of Japan, although Australia has not accepted the treaty and no Japanese citizen can enter Australia save as a matter of courtesy. Foreign Powers doubtless might take exception to the existence of such a differentiation, but they can only do so when framing fresh treaties, and it may safely be assumed that the whole of the influence of the British Government and the Governments of the Dominions would be exerted to counter any such attempt to vary the existing practice. The matter, of course, has another side: when, for example, the United Kingdom surrendered by the Treaty of Lausanne her extraterritorial jurisdiction over British subjects in Turkey, or renounced in 1926 similar rights in Albania, she neither could nor would



limit the renunciation by excluding its application to Dominion citizens. Nor is it desirable that any change should take place; it is no part of the report of 1926 to destroy the unity of the Empire; its aim is to assert and extend the autonomy of the units whose interaction is essential to the whole.

Another problem of a more material kind has been created by the assertion of the report in favour of the removal of any sign of superiority on the part of the Imperial Parliament and Government over those of the Dominions. The Dominions have profited greatly by the recognition, at their earnest request, of their loans as trustee securities, for without this recognition it is absolutely certain that they must have paid substantially more for the enormous amounts which, very naturally, they have borrowed in pursuance of the essential work of developing their virgin lands. Now one principle has been insisted on by the British Government as a condition of placing Dominion loans on the list of trustee stocks: each Dominion Government has been required to place on record the view that any Dominion legislation impairing the security for the loan would properly be disallowed. The power of the Crown, on the advice of the British Government, to disallow any Dominion Act remains still absolute in law, but the Conference referred this, with other technical points, for consideration by an expert committee. The matter is complicated by the fact that the Australian States are also deeply concerned as constant borrowers on the London market, and, while it would not be impossible to discriminate between the case of the States and that of the Dominions, a vital change as regards the latter would evoke strong claims for similar treatment by the States.<sup>1</sup> In any case the use of disallowance is too drastic a weapon to be relied upon, and the obvious solution which suggests itself is the adoption of an agreement for the reference to an impartial authority within the Empire of any dispute of

<sup>1</sup> This issue has been solved in part by the financial agreement under which the Commonwealth is responsible for State debts; see Keith, *Constitutional Law of the British Dominions*, p. 315.

a pecuniary character which may arise between the British and a Dominion or State Government. An obvious tribunal is present in the Judicial Committee of the Privy Council, with a fuller representation of Dominion judges, which might well play the part of determining inter-Imperial disputes, just as the Supreme Court of the United States decides inter-State disputes issues, and it may be noted that as early as 1879 some such conception of the development of the Committee was present to Sir Michael Hicks-Beach as Secretary of State for the Colonies.

#### 46. THE SOUTH AFRICAN FLAG

*To the Editor of THE SCOTSMAN, 22 October 1927.*

Your correspondent 'South African' in your issue of to-day contends that the new constitutional position 'converts the legitimate aspiration for a national flag into a moral necessity'. It is interesting to contrast with this view the opinion of the Premier of Quebec, whose right to speak for French Canadians is sufficiently established by the elections of May 16 which gave the party under his leadership 74 seats in a House of 85. Speaking at Toronto on June 15, after asserting that 'the province of Quebec will stick to the British tie and the British connection as long as the British Empire shall endure', he added, 'The British flag has given us liberty, and the British flag does not interfere with our national aspirations.' It is clear that Mr. Taschereau does not share the view that the equality of the Dominions with the United Kingdom demands the creation of a distinctive flag.

But, granting the legitimacy of the aspiration for a national flag, it is clearly unfortunate that it should be found necessary to impose it by mere weight of numbers, and no satisfactory explanation appears to have been offered why the Government of the Union has refused to accept the design proposed by the majority in the Senate under the suggestion of General Smuts, under which the Union flag would accord equal

space to the Union Jack, to the old flag of the South African Republic and to that of the Orange Free State. The doctrine of equality asserted by the Conference of 1926 was, after all, that of equality in the Empire, and the opposition in the Union can hardly be blamed if it resents General Hertzog's description of the Union Jack as an intruder there.<sup>1</sup>

#### 47. GENERAL HERTZOG'S NATIVE POLICY

*To the Editor of THE SCOTSMAN, 16 December 1927.*

Three causes may be suggested for the remarkable petulance of General Hertzog, on which you comment to-day. In the first place, the position of the British Government in respect of the abolition of the native franchise as it exists at present in the Cape of Good Hope must inevitably be discussed. When union was agreed upon, the British Government naturally suggested that Cecil Rhodes's ideal of equal rights for every civilized man might be borne in mind when the franchise was discussed, while, on the other hand, the representatives of the Transvaal and the Orange River Colony stood firmly for the exclusion of natives from the vote, for the time being at any rate. The result was a compromise which afforded a special constitutional protection to the Cape native vote, and that protection was strengthened by the British Government in deference to the wishes of the House of Commons, for a special clause was inserted in the Royal Instructions to the Governor-General requiring him to reserve in particular any Bill taking away the native vote in the Cape. As such a Bill under the Constitution itself must be reserved, this unusual procedure was adopted to distinguish between ordinary cases of constitutional change to which, after reservation, assent would be given practically as a matter of course, and the exceptional

<sup>1</sup> For the final compromise see Keith, *The Sovereignty of the British Dominions*, pp. 60, 61, 273.

case of the native franchise, alteration in which would require serious consideration by the British Government. No change in this position has been made by the Imperial Conference Report in 1926; that Janus-like document expressly qualifies the right of each Dominion Government to advise the Crown in all matters relating to its own affairs by the words 'apart from provisions embodied in constitutions or in specific statutes expressly providing for reservation'. Where reservation is provided for by statute, we have Mr. Baldwin's authority for the view that no constitutional change has taken place so far, nor is the matter open to doubt. A reserved Bill must be assented to by His Majesty in Council, and nothing can be done in Council save on the advice of a British Minister. General Hertzog doubtless desires to prevent any opposition in the British Parliament to the acceptance of any measure which may finally be reserved for the royal assent: but it is clearly inconceivable that any British Government would interfere in the deliberate decision of the people of the Union, whatever views it might hold regarding the wisdom of the native policy of that Dominion.

Secondly, General Hertzog is doubtless concerned with the bearings of his native policy on the question of the transfer of Basutoland and the Bechuanaland and Swaziland Protectorates to Union control. These territories have so far been administered by the British Government on the principle of trusteeship for the natives; transfer to the Union would mean that the natives would be relegated to a definite status of inferiority and their interests subordinated to those of the European population. It is clearly a very difficult issue to decide whether His Majesty's obligations, in view of past promises given in the name of the Crown to the natives of these territories, are compatible with the transfer of the territories to the Union. When the possibility of such transfer was considered by the British Government in 1909, the British Government of the day had no expectation that the native franchise in the Cape would disappear, and, instead, hoped

that gradually a measure of native representation on an equitable basis would be introduced.<sup>1</sup>

Thirdly, General Hertzog is aware of the criticism which has been directed against the mode in which the Union has interpreted the 'sacred trust of civilization' entrusted to it in the form of the mandate for South-West Africa. Admittedly, that territory is governed primarily in the interests of the European population, and it is not surprising that Germany and other members of the League of Nations should question the adoption of a line of policy which, after all, was the justification of the deprivation of Germany of the territory. But the British Government has sedulously abstained from any criticism or suggestion of intervention.

#### 48. GENERAL HERTZOG AND THE IMPERIAL CONFERENCE

*To the Editor of THE SCOTSMAN, 9 March 1928.*

It is interesting to find that General Hertzog has finally decided to adopt the view that the resolution of the Imperial Conference of 1926 has conferred upon the Union complete sovereign international status, with the result that, when war is declared by His Majesty on the advice of the Imperial Ministry, the Union will not be affected by the declaration, but will be in the same position as any neutral foreign State. By asking the Union Parliament to accept the resolution of the Imperial Conference on this understanding, he has gone much farther than a mere expression of opinion, and the matter can hardly be allowed to remain ambiguous. The new claim must be distinguished clearly from the fact, admitted for the last twenty years at least, that it is entirely for each Dominion to decide in the event of war to what extent active assistance shall be given to the United Kingdom; it has far-reaching consequences for practical life, for, if the declaration is sound, during a British war British South Africans will

<sup>1</sup> See No. 115, *post.*

be free to trade at their pleasure with the enemy, and the Union Government will be bound to secure that they render no non-neutral services to the mother country, unless it definitely departs from neutrality and nullifies the advantage of its new status by taking upon itself deliberately participation in the war.

Now from the Imperial point of view the claim made by General Hertzog is decidedly amazing. The Imperial Conference, in his opinion, sitting in secret, none of the Prime Ministers having any mandate whatever from their Parliaments on the topic, was competent, with the sanction of the King, to break up the diplomatic unity of the Empire, and to create instead a number of sovereign independent States. No more amazing negation of democratic control can be imagined, and the absurdity of the contention is increased when we find that, while the Parliaments of the United Kingdom and the other Dominions have also discussed the report, in none has the view been affirmed that the Dominions are sovereign independent States in the sense asserted by General Hertzog; even in the Irish Free State the issue was evaded, and Messrs. Mackenzie King, Bruce, and Coates would clearly decline to homologate the assertion of General Hertzog. They recognize that this is a matter which can only be dealt with deliberately and frankly, with the full assent of their Parliaments, and that the fate of the Empire is not to be disposed of at a secret conclave.

From the international point of view, of course, the decision of an Imperial Conference is only of subsidiary importance, and it may safely be assumed that no state in friendly relations with the United Kingdom would treat the Dominions as sovereign in General Hertzog's sense merely on the strength of it. There is a perfectly simple way to dispose of the issue. If the British Government agrees with General Hertzog, it has merely to send a circular to the Powers of Europe and the rest of the world, intimating, as it did in the case of Egypt, that it recognizes the Dominions as sovereign independent

States, subject, as in that case, if it thinks fit, to any qualifications. It is clear, of course, that the British Government could not take any such step without the approval of Parliament and the other Dominions, and this fact really disposes of the validity of General Hertzog's claim.

It is, however, clearly to be regretted that the Conference of 1926 fell back on the device of seeking under ambiguous phraseology to reconcile very opposite views, and, as General Hertzog is so refreshingly frank in the assertion of his views, it would be satisfactory to have like candour from some representative of the British Government. Vague rhetoric is not always adequate when definite issues are, legitimately enough, posed.

#### 49. THE PRIVY COUNCIL AND THE IRISH FREE STATE

*To the Editor of THE SCOTSMAN, 26 April 1928.*

The Privy Council has now twice come into conflict with the Government of the Irish Free State, in both cases with disastrous results. In the first the issue was a purely domestic one in which it would doubtless have been wiser for the Judicial Committee to refrain from granting leave to appeal. The Free State Parliament forthwith disposed of it by enacting that the law meant what it was held to mean by the Supreme Court. The second case was very different: it turned on the interpretation of the Treaty of 1921, and there is no doubt whatever that it was the deliberate intention of the British Government that the Judicial Committee should have the final voice in the issue of the meaning of the treaty. The Irish Free State has never disguised its intention that its own Courts shall have the final say, and it attempted, though ineffectively, to have this conceded at the Imperial Conference of 1926. But in fact, as has just been seen, the Judicial Committee has been driven to confess error, and the Parliaments of the United Kingdom and the Free State are pledged to undo

that error, unless an exit can be found in the unprecedented action of the Privy Council in reversing one of its own judgments.

As the determination of the Free State is clear, and as episodes of this kind are fatal to the prestige of the Judicial Committee and will do great injury to it in the rest of the Empire, has not the time come for the abandonment of the claim that the Judicial Committee shall be the arbiter in disputes as to the meaning of the treaty? Would it not be far more dignified and more in keeping with the interests of the Empire for the British and Free State Governments to agree to arbitration by a tribunal representative of the United Kingdom and all the Dominions of issues of this kind? Such a procedure seems open to no objection on score of principle. The Irish Free State cannot claim that it is to have the last word as regards the interpretation of a treaty, and it is obvious that, as matters stand, the possibility of using the Judicial Committee as a Court with final powers of interpreting the Constitution has disappeared.<sup>1</sup>

## 50. THE EMPIRE AND THE PEACE PACT

*To the Editor of THE SCOTSMAN, 20 July 1928.*

Whatever its merits on other grounds, it is clear that the acceptance of the new treaty renouncing war entails a further weakening of the cohesion of the British Empire, and at last presents a tangible argument to those who, like General Hertzog, maintain that a Dominion can adopt the legal status of neutrality during a war in which the United Kingdom is engaged.

The British Government has reserved the right to treat an attack on Egypt or on Iraq as in effect an attack on British territory and as justifying war. The mode of dealing with the new treaty under which it will be accepted for each Dominion separately will create a very difficult position, if there should

<sup>1</sup> See Keith, *Constitutional Law of the British Dominions*, pp. 277 ff.



arise a position of affairs in which the British Government believes that it must go to war, while that of Canada or South Africa holds a different opinion.

The Canadian Government has already made it clear in connexion with the proposed treaty of alliance with Egypt that Canada would be unlikely to take active steps to aid the United Kingdom in a war arising out of this alliance. The matter now, however, goes much farther. Canada might well feel that under an international engagement she could not go to war, and must therefore preserve complete neutrality, while in view of the treaty such neutrality would be accorded recognition by the Powers.

A comparison with the Locarno Pact will show how much farther we have advanced in the disintegration of the international unity of the Empire. The advantages of this weakening to foreign Powers are obvious, and it may be assumed that, if there has been some lack of enthusiasm in the Foreign Office in regard to the treaty, it has not been unconnected with reflections on the danger of weakening an Empire which, by unity in the past, has served very substantially the cause of peace.

## 51. IMPERIAL POLICY CONSULTATIONS

*To the Editor of THE SCOTSMAN, 22 February 1929.*

With all due deference to your London correspondent, I do not think that Mr. Mackenzie King<sup>1</sup> can be held to have 'misinterpreted unintentionally the rules of procedure laid down by the Imperial Conference of 1926' regarding treaty negotiation. It is perfectly true that the decision of the Conference authorizes any Government, which has notified to the other Governments of the Empire its intention to proceed with a treaty negotiation, to proceed with that negotiation if it has received no adverse comments, and its proposals involve no

<sup>1</sup> Mr. King criticized in the Canadian House of Commons the failure of the British Government to keep Canada *au courant* with the Anglo-French naval negotiations; see *J.P.E.* x. 313.

active obligation on the part of other Governments. But I can find no authority for the view that this rule was intended to absolve a Government in these circumstances from keeping the other Governments informed of the process of its negotiations, and it appears clear that the giving of such information is most desirable. A negotiation of any importance may at any moment develop issues which may interest a Dominion, and it can never be safe for the Imperial Government to assume that it is able to judge effectively whether its proposals do or do not impose what is vaguely styled an 'active obligation' on any Dominion. Moreover, in view of the specially intimate relations between Canada and the United States and France, it would seem that information should have been tendered as a matter of course, nor is any explanation obvious for the fact that Canada was informed of the final outcome only after some Governments had been notified of it through the British Embassies.

I have always understood that the rule was that the Dominions should be kept informed of the course of all important negotiations unless they intimated that they did not consider this necessary, and it seems clear that any other procedure is dangerous to Imperial harmony.

## 52. GENERAL HERTZOG AND THE GERMAN TREATY

*To the Editor of THE SCOTSMAN, 2 March 1929.*

General Hertzog's claim that the ratification of a treaty<sup>1</sup> is an executive act, and that it is within the discretion of a Government to decide whether it will or will not take both Houses of Parliament into consultation on the advisability of action, is doubtless sound as a general proposition. Nor is there any doubt that, if ratified, a treaty becomes binding,

<sup>1</sup> The Treaty of 1928 with Germany precluded any further British preference over that power and was objected to in the Senate on that score. This anomaly was rescinded only after the Ottawa agreement with the United Kingdom of 1932.

though legislation may be necessary to give it effect under municipal law. In this case, however, the position is complicated: the effect of the Customs Tariff and Excise Duties Amendment Act of 1925 of the Union appears to be that an agreement for reciprocal differential treatment concluded by the Union with a foreign State is to have no force or effect until approved by resolutions of both Houses of Parliament, so that *prima facie* there is a constitutional duty on the Prime Minister to secure these resolutions before ratification is decided upon. Of course, if ratification is carried out without obtaining the concurrence of the Senate, that can be asked for *ex post facto* or the matter can be carried through by a Bill which might be passed, in event of disagreement between the Houses, in a joint session. The reports do not make it clear what plan has been decided on by General Hertzog, but it is plain that the procedure proposed is in any case not in accord with the arrangements accepted by Parliament in 1925, and is, therefore, open to substantial objections on constitutional grounds.

May I, when writing, point out that the action of Lord Strickland, which appears to have excited ecclesiastical indignation, seems to have consisted in the main in his energetic efforts to assert in Malta, as against Italian, the rights of English, on the one hand, and of Maltese, the speech of the great majority of the people, on the other? It is incredible that he should really be hostile to the Roman Catholic Church in Malta.

### 53. BRITAIN AND THE WORLD COURT

*To the Editor of THE SCOTSMAN, 18 March 1929.*

There are, I think, serious objections both on international and national grounds to the proposal, which is being pressed forward by the British Government,<sup>1</sup> that in a dispute before the Permanent Court of International Justice, to which a

<sup>1</sup> It failed to secure acceptance on the ground *in primis* that the issue was not relevant to the discussion in which it was raised. The matter is still undetermined.

Dominion is a party, the Dominion should be entitled to a national judge in addition to a British judge.

Internationally, in a dispute between Germany and Canada this would mean that Germany would be expected to regard as just the fact that as against a single German judge there were two judges representing nations owing a common allegiance and associated in the British Empire, and, what is even more significant, both exponents of the English school of International Law. It is really asking too much to expect that this position would be acceptable. Consider also the position if the United States should consent to accept the jurisdiction of the Court in a dispute with Canada.

Nationally, it cannot be overlooked that, if the British judge were to disagree with the Canadian judge, the average Canadian would regard his action with the same disfavour that was meted out to Lord Alverstone's 'betrayal' of Canadian interests in the Alaska boundary case. What is more important is that the British insistence on the distinct character of the Dominions is wholly opposed to the claim which is made that the Irish Free State cannot demand that a dispute with the United Kingdom can be dealt with by the Permanent Court. If membership of the Empire limits thus the status of the Dominions, it is reasonable that it should be admitted that it cannot be claimed, as against foreign States, that British and Dominion judges are totally distinct.

What is required is simply that, if a Dominion is concerned in litigation, it should have the right to have its own judge on the Court in lieu of the British judge, unless it prefers to waive the claim. That would afford it the fullest admission of status without infringing the rights of other States and diminishing the validity of the doctrine of Empire solidarity.

#### 54. INTER-IMPERIAL DISPUTES

*To the Editor of THE SCOTSMAN, 2 May 1929.*

While the case against the immediate acceptance by the Empire of the optional clause is doubtless conclusive, one of

the arguments used by the Lord Chancellor is distinctly disappointing. He adduced as a matter which would require reservation inter-Imperial disputes,<sup>1</sup> and it must be concluded that in his view this issue has not, as most of us hoped, been finally disposed of by the Imperial Conference of 1926. It was then agreed that the terms of international conventions must not be regarded as regulating *inter se* the rights and obligations of various parts of the Empire, a principle asserted by the Legal Committee of the Arms Traffic Conference of 1925, and it has been generally held that this agreement was a definite negation of the former claim of the Irish Free State that inter-Imperial arrangements were treaties of international law.<sup>2</sup> A natural deduction from this principle has been that questions arising between parts of the Empire are not within the sphere of the Permanent Court, and that this issue is irrelevant to the question of acceptance of the optional clause.

As the Lord Chancellor has thrown doubt on the soundness of that deduction, it is plain that the point should be cleared up as early as possible. If there is agreement on the point among the Governments of the Empire, a formal intimation of the accepted view might be made to the League Assembly at its next meeting, when an appropriate opportunity would be afforded on the occasion of the discussion of the revision of the Statute of the Permanent Court. If such agreement unhappily does not exist, the issue should be dealt with by the next Imperial Conference.<sup>3</sup>

## 55. THE WASHINGTON HOURS CONVENTION

*To the Editor of THE SCOTSMAN, 12 June 1929.*

There are two sets of difficulties regarding the ratification of the Washington Hours Convention. The first consists of the fact that foreign Powers notoriously interpret its terms in

<sup>1</sup> The Labour Government in accepting the clause in 1929 made this reservation; see *Speeches and Documents on the British Dominions, 1918-1931*, p. 413.

<sup>2</sup> See No. 40, *ante*.

<sup>3</sup> See No. 58, *post*.

many matters far less strictly than does the United Kingdom, so that in practice the Convention must operate against British interests. It is clear from the history of the Convention that this disadvantage cannot be removed; acceptance of the interpretations arrived at in 1926 at the London Conference, even were it possible, would still leave much unsatisfactory. The second difficulty is presented by the fact that certain British practices may be held not to be warranted by the Convention, though they are beneficial to the workers, and that international action against the United Kingdom might be taken in respect of these practices if the Convention were ratified without amendment. In this case it may be possible to avoid any real danger of international complaint. The Government, in view of its policy in 1924, will doubtless seek the approval of the House of Commons for ratification, and the House can place on record its interpretation of the ambiguous clauses of the Convention, and the ratification can be expressed as being based on that interpretation. It would, of course, not be binding on other States as regards their own interpretation, but it would doubtless preclude them from challenging the legality of the British practices.

While the governmental rule of 1924 as regards ratification deserves to be followed, it may be hoped that there will be no repetition of the grave error of that year when recognition *de iure* was accorded to the Russian Government without obtaining the concurrence of the Dominions. It is understood that the Prime Minister gave a definite assurance that this procedure would not be repeated, and the appointment of Mr. Ponsonby to the Dominions Office may be explained by a desire to use his diplomatic talents to secure Dominion concurrence in foreign policy. Recognition is clearly an issue in which Imperial division is seriously to be deprecated, and Canada in special has very strong views on propaganda by Bolshevik agents in her territory.

## 56. THE GOVERNMENT AND RUSSIA

*To the Editor of THE SCOTSMAN, 13 July 1929.*

Mr. Ramsay MacDonald's attitude towards the resumption of official relations with Russia raises two points of difficulty. Even the late Government, despite its control of the House of Commons, made its final determination to sever relations dependent on the approval of the House of Commons, and it seems far more essential that this approval should be accorded when the Government in office controls only a minority of votes. Moreover, when it is remembered how much stress was laid in 1924 by the Labour Government on the necessity of parliamentary sanction for treaty ratification, it is difficult to understand why a mere executive decision in regard to the resumption of full diplomatic relations should be deemed adequate.

Much more serious, however, is the fact that the Prime Minister seems to contemplate as possible such a resumption by the United Kingdom, even if one or more of the Dominions do not agree. In 1924 recognition of the Russian Government *de iure* was accorded without Dominion assent; it was generally held that it bound the Dominions, and, in deference to their objections to such a course of action, pledges not to act again without consultation were given.<sup>1</sup> But it will be most unfortunate if it is finally decided that the United Kingdom can resume relations, while one or more of the Dominions may refuse to do so. This would create a new precedent of breaking up Imperial unity, and one for which the prime responsibility would rest with the British Government. Before anything of this sort occurs, it would seem incumbent on the Prime Minister to use every possible effort to secure agreement in united action, and recourse to separate action should be had only if Dominion opinion should prove wholly unreasonable, of which there is at present no suggestion.

<sup>1</sup> See Keith, *The Sovereignty of the British Dominions*, pp. viii, 385, 386.

## 57. THE RUSSIAN NEGOTIATIONS

*To the Editor of THE SCOTSMAN, 2 October 1929.*

The Foreign Office announcements on the Russian negotiations remain silent on the vital question of Dominion concurrence in the proposed resumption of full diplomatic relations. In 1924 recognition *de jure* was accorded to Russia without Dominion assent, and admittedly bound the whole of the Empire. Under the Conference resolutions of 1926 it is clear that action of the type of 1924 would be unconstitutional, and that it must be made clear, if diplomatic relations are resumed, to what portions of the Empire their sumption applies. There is no precedent for partial resumption of diplomatic relations, and it is manifestly most undesirable that one should be created unless in case of absolute necessity. Has the Foreign Secretary secured the concurrence of the Dominions and India in the resumption of diplomatic relations? If not—and the attitude of Australia suggests grave doubt—are there sufficient reasons for breaking the rule of joint action in foreign policy, just recognized in the case of the acceptance of the optional clause by all parts of the Empire save the Irish Free State? It may be hoped that these matters will be taken up seriously when Parliament meets. No doubt to concert action with the Dominions is tedious, and it is simpler for each part of the Empire to go its own way; but the process must be destructive ultimately of that Imperial unity which each Conference assures us all the Governments of the Empire are determined to uphold.

58. THE IRISH FREE STATE AND THE  
OPTIONAL CLAUSE

*To the Editor of THE SCOTSMAN, 17 September 1929.*

The action of the Irish Free State in respect of the optional clause of the Statute of the Permanent Court of International Justice, reported in your issue of to-day, indicates the desire of



the State to reopen the controversy, which seemed to be closed by the resolution of the Imperial Conference of 1926, regarding the relation of the British Empire to the League Covenant. This attitude increases the necessity of care being taken by other parts of the Empire in signing the clause to exclude from the operation of compulsory reference to the Court disputes arising between different parts of the Empire, for, while the general view within the Empire is that such disputes could not fall within the sphere of the Court, it is plain that the Irish Free State does not homologate that view. Express reservation by the United Kingdom and the rest of the parts of the Empire will remove any risk of misunderstanding or controversy.

It is clear also that it is most desirable that not only matters of prize law but also immigration issues should be expressly excluded. No doubt the prevailing doctrine regards immigration as an issue of a domestic character which would not fall within the sphere of the Court, but the matter should not be left in the slightest ambiguity; Canada, Australia, New Zealand, and the Union should not expose themselves to the possibility of having their exclusion policy questioned before an international tribunal which on the merits might have very little sympathy with it.

#### 59. THE OPTIONAL CLAUSE AND THE UNION OF SOUTH AFRICA

*To the Editor of THE SCOTSMAN, 20 September 1929.*

The High Commissioner for the Union, in his assertion that but for the reservation made in accepting the optional clause inter-Imperial disputes might have been brought before the Permanent Court, cites the authority of the Imperial Conference Resolutions of 1926. He must, however, have forgotten that the Imperial Conference definitely laid it down that the terms of any international convention 'must not be regarded as regulating *inter se* the rights and obligations of the various territories on behalf of which it has been signed in the name of

the King'. This doctrine was accepted by the Parliament of the Union, and clearly cannot be repudiated by the executive of its own authority. Mr. Louw's further argument that the making of the reservation is an admission that without it such disputes are justiciable by the Court is wholly untenable, for the Governments concerned have also expressly reserved questions falling exclusively within domestic jurisdiction. In both cases they have acted *ex majore cautela* in order to prevent the possibility of misunderstanding.

The reference to 'situations or facts' in the acceptance is, I think, not an effort to exclude from the cognizance of the Courts decisions on points of law or of treaty interpretation. It is intended to meet the necessity of preventing the Court from dealing with the issues as to naval warfare which were contested by foreign powers during the war. This is brought about by confining jurisdiction to disputes arising after ratification with regard to situations or facts subsequent to ratification; the double safeguard will clearly prevent prize questions being reviewed, while it may be hoped that in the next ten years such progress will be made in defining international law as to render it possible to avoid continuation of the reservation of issues as to maritime war. It may, however, be doubted whether so wide a reservation was really necessary; at any rate it very greatly diminishes the significance of the acceptance of the optional clause and contrasts curiously with the stress placed on the issue by supporters of the Labour party before the general election.

## 60. THE DOMINIONS AND PRIVY COUNCIL APPEALS

*To the Editor of THE SCOTSMAN, 22 November 1929.*

In your London correspondence to-day it is suggested that 'Australia and South Africa have already abandoned appeals to the Privy Council without attracting much notice', and that the Free State objection to the appeal is dictated by these

precedents. There is, however, clearly a misunderstanding in this suggestion. In Australia appeals lie and are regularly brought, when desired, from the Supreme Courts of the States and the High Court of the Commonwealth on all issues save the narrow class of questions connected with the rights *inter se* of the Commonwealth and the States and of the States among themselves. The exclusion of this class of case is provided for in the Commonwealth Constitution of 1900, and it was agreed to by the Imperial Government only after the fullest discussion in Parliament. In the case of South Africa there is no prohibition whatever of appeals on any issue from the final court of appeal there. Power to limit the appeal is given to the Parliament, subject to reservation of any Bill on this head. But no such measure has yet been passed, and General Hertzog has not committed himself to such action at present. Appeals are few, because constitutional issues rarely arise in a unitary constitution and in other matters the Privy Council has no special competence, for the Union enjoys a unique legal system.

In the Irish Free State an appeal on any issue constitutional or otherwise lies from the final tribunal, and under the scheme of the Constitution that appeal in constitutional matters cannot be destroyed by any Act of the Free State Parliament. The form of the Free State Constitution in this matter was due to the insistence of the Imperial Government, and its insistence again was due to the essential provision of the Irish Treaty of 1921 that the Free State was to enjoy the constitutional rights of Canada. In Canada the appeal is preserved essentially because of the protection it affords to racial or linguistic or religious minorities, and in the Free State it was hoped thus to secure the position of the minority in Southern Ireland. The gravamen of the charge against the Free State is that it is violating its obligation under the treaty of respecting the right of appeal and is overriding the clear terms of its own Constitution. It is true that the means adopted are not so far absolutely illegal, but most of us will agree that

the proper method of procedure would have been by means of agreement with the United Kingdom and the formal alteration with its assent of the Constitution.

## 61. THE REMOVAL OF THE LIMITATIONS ON DOMINION LEGISLATION

*To the Editor of THE SCOTSMAN, 5 February 1930.*

The recommendations of the Conference on Dominion Legislation in one very serious issue go substantially beyond the proposals of the Imperial Conference of 1926. That Conference contemplated the extension of the powers of the Dominions to allow of extraterritorial legislation ancillary to provision for the peace, order, and good government of the Dominions, a limitation of the utmost importance, though open to objection in point of form. The present Conference has swept away this limitation, has refused to accept the proposal to limit the power to Dominion nationals, and has proposed to give Dominion laws full extraterritorial validity. The result will be of the gravest importance to Northern Ireland. The Irish Free State will have the full power to regulate the fisheries of Ireland and to penalize breaches of its enactments by British subjects in Northern Ireland. It will also be in a position to pass financial and other legislation which will exert a severe pressure on Northern Ireland to enter the Free State. Some years ago, I understand, the Prime Minister of Northern Ireland was fully aware of the danger of the grant of full authority in this regard to the Free State, and it does not appear that the risk of unfair pressure is now diminished. Similarly, Australian efforts to tax British residents in the United Kingdom in respect of profits derived in any degree from the Commonwealth have been hampered by the decisions of the High Court based on the territorial limitation; this withdrawn, it may confidently be assumed that Commonwealth legislation will go even farther than it has attempted to go in the past.

The issue is even more serious in its application to merchant shipping. For the last twenty-five years the provisions of the Merchant Shipping Act, 1894, coupled with the restriction on extraterritorial legislation, have enabled the Imperial Government to prevent the Commonwealth and New Zealand imposing on British shipping, not engaged in the coasting trade, Australian conditions of manning, pay, &c., whose impracticable character is sufficiently attested by the ruin which they brought on the Commonwealth Governmental shipping adventure. In the same way both these Dominions were restrained from excluding British Indians from employment on British ships trading to these territories. This protection is now to be thrown away on the strength of a vague hope of agreement to restrict the exercise of the legal powers to be conferred. When the fate of the agreement unanimously arrived at in 1907 on this head is remembered, the absurdity of the proposal is obvious. It is clear that the purpose of the Imperial Conference agreement of 1926 would be adequately and justly implemented if the power of extraterritorial legislation were restricted to (1) Dominion nationals, and (2) Dominion registered shipping and shipping engaged in the coasting trade; as regards both these categories of shipping it is indeed probable that the Dominions already legally possess full power, but the matter might be made absolutely clear.

It is further unfortunate that the proposals as to reservation and disallowance will afford the strongest grounds for Republicans in the Union of South Africa and the Irish Free State to renew their efforts to bring about formal secession. If carried out without further safeguards, it will be open to them to argue that secession by simple Dominion Act is legal, a doctrine which General Smuts has consistently denied; and the position of those who are opposed to separation will be seriously weakened.<sup>1</sup> The Free State will certainly claim the right to abolish the appeal to the Privy Council.<sup>2</sup> As Dominion status is asserted to be the goal of Indian progress, it is unfortunate

<sup>1</sup> See No. 111, *post*.

<sup>2</sup> See No. 100, *post*.

that the Conference did not make it clear that that status does not include the right to sever the Imperial connexion at the pleasure of any member of the Empire.

It must be added that the proposed clauses of an Imperial Act are so badly drafted as to leave room for interminable legal dispute. It is clearly desired not to interfere with the Canadian Constitution; yet, as matters stand, it will probably be open for the Federal Parliament to cut off the appeal from the Supreme Court to the Privy Council,<sup>1</sup> and to enable the Supreme Court to decide finally constitutional issues which might overthrow the rights of the Provinces. It may be hoped that this error at least will be corrected.

## 62. MR. BALDWIN'S PROPOSALS FOR A REFERENDUM

*To the Editor of THE SCOTSMAN, 5 March 1930.*

However much one may sympathize with Mr. Baldwin in the difficulties induced by the United Empire movement, his own solution appears to be open to most serious constitutional objections. In the first place, the idea of inter-Imperial tariff arrangements is, after all, only a revival in a modified form of Mr. Chamberlain's proposals, and to be of value it implies that the Dominions shall check the progress of industrial development as regards secondary industries. Now, students of Dominion politics realize that the widest industrial development is part of the ideal of nationhood, which is accepted as fundamental by public opinion in the Dominions, and, just as Imperial federation has been absolutely rejected by the Dominions, it will undoubtedly be found that they will equally reject any proposal to hamper their industrial growth. Mr. Baldwin's suggested referendum is, therefore, never likely to be put to service on this account.

In the second place, the whole idea of a non-political

<sup>1</sup> In criminal causes this action was taken in 1933 by the Criminal Code Amendment Act.

referendum seems chimerical when the issue is, as Mr. Baldwin insists, 'a constitutional issue if ever there was one'. The Commonwealth of Australia included in its Constitution the referendum on constitutional changes, and experience has shown that the referenda have been bitterly fought on party lines, utterly falsifying the predictions of those who, like Mr. Baldwin, fancied that an appeal to the people to change the Constitution could be conducted in an atmosphere of detachment from political party. The Irish Free State has so clearly recognized the dangers of the referendum that it has ejected it for normal purposes from the Constitution, and even for constitutional change has relegated its application to a distant future. A study of Dominion referenda will prove that they can be held without involving political party action only when the matters involved cut clean across party feeling, as in the case of liquor prohibition. To cite foreign practice is, I fear, useless, because the British parliamentary system of government differs essentially from continental practice, and I agree entirely with the conclusions of Sir John Marriott: 'The referendum is a natural product of conditions which differ widely from those which prevail in England; while it has flourished on a soil impregnated with principles of federalism and direct democracy, and among a people few in numbers but keenly and closely interested in the art of government, its transplantation to an alien soil might nevertheless be attended with results disappointing if not actually dangerous.'

### 63. SHIPPING AND THE EMPIRE

#### POWERS OF THE DOMINIONS

*To the Editor of THE TIMES, 15 April 1930.*

It appears from the memorandum of the Chamber of Shipping summarized in your issue of April 15 that the Chamber is unaware of the nature of the proposals of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation, 1929, accepted by the Imperial representa-

tives at that Conference. These proposals contemplate the complete abrogation of the whole of the protection accorded to British shipping by the restrictions on Dominion legislation, imposed by the Merchant Shipping Act, the abolition of the supremacy of Imperial legislation hitherto secured by the Colonial Laws Validity Act, and the grant to the Dominions of unrestricted power of extraterritorial legislation.

It is thus proposed completely to depart from the agreement achieved after prolonged discussion by the Colonial Merchant Shipping Conference of 1907, which fully represented shipping interests, and at which Australia had as spokesmen such pronounced Nationalists as Sir W. Lyne and Mr. Hughes. It was then agreed to be just and proper that each part of the Empire should exercise complete control over its registered shipping and all British vessels engaged in its coasting trade. This principle conceded the full constitutional equality of the several Governments, and there seem to be no adequate grounds for the present proposal to accord to every part of the Empire power to deal with all British shipping. No doubt the framers of the Conference Report cherish the hope that legislative chaos will be avoided by inter-Imperial agreements,<sup>1</sup> but no one familiar with the trend of opinion on merchant shipping legislation in the Commonwealth or New Zealand in the last twenty-five years or with Indian aspirations on this topic will feel any confidence in the fulfilment of this ideal.

#### 64. SOUTH AFRICA AND SECESSION

*To the Editor of THE SCOTSMAN, 21 May 1930.*

There can be no question that General Smuts's views on the constitutional question of the right of secession are legally sound as contrasted with those of General Hertzog. The latter

<sup>1</sup> See the Commonwealth Merchant Shipping Agreement, December 10, 1931; *Speeches and Documents on the British Dominions, 1918-1931*, pp. 220-30. Legislation to give effect to the agreement has been prepared by Canada and passed as the Canada Shipping Act, 1934, but its operation awaits corresponding legislation elsewhere.



has himself admitted that the Imperial Conference of 1926 did not deal with the claim of the right of secession, and it is clear that it would have declined to consider it. The Conference of 1929 was held merely under a resolution of the Conference of 1926 in order to clarify the general principles enunciated by the Conference of 1926. It was a body essentially of technical representatives, not of Prime Ministers, and its agreement is a matter for consideration by the Imperial Conference this year. It would have been wholly improper for any such subordinate body to introduce any fundamentally novel principle, and as matter of fact it is perfectly clear, as General Smuts has pointed out, that the Conference recognized that no right of secession had ever been conceded. Apart from the question of the necessity of Imperial accord in regulating the issue of the Royal succession to which General Smuts has called attention, the reference to the power of the Irish Free State to alter its Constitution is carefully chosen to exclude the admission of any right of secession.

Fortunately the proposal of redefining by Imperial Act the powers of the Dominion Parliament will compel the due consideration by the House of Commons and the House of Lords of the nature of Imperial relations. It is most unsatisfactory and contrary to the spirit of the Constitution that these matters should be left to secret deliberations of Prime Ministers and to vague declarations open to such divergent interpretations as those given by Generals Smuts and Hertzog. The Parliaments of the Union and the Irish Free State alone attempted to define what they understood by the resolutions of 1926, and their interpretations would obviously have been rejected in the rest of the Empire. The promise of Dominion status to India renders it absolutely imperative that General Hertzog's demand should be answered, and it be made clear whether any part of the Empire has now the right by simple unilateral action to retire from the Empire, or whether the consent of the United Kingdom and the other Dominions must be obtained. The same rule must apply to India, and it is earnestly to be

hoped that the issue will now be definitely faced by Parliament. There is much to be said both for and against conceding the right, but as General Hertzog is determined to raise the issue, and is supported by the majority of the Union Parliament, it is unwise to seek indefinitely to postpone serious discussion.

## 65. SOUTH AFRICA AND SECESSION

*To the Editor of THE SCOTSMAN, 30 July 1930.*

General Hertzog assures us that the Imperial Conference most certainly will honour and uphold the resolution of the Union House of Assembly approving the results of the Imperial Conference of 1929, subject to the specific proviso that the right of South Africa to secede shall be maintained. The proviso, which was passed on a party vote by a majority of 12, is general, applying to all the Dominions, and General Hertzog's claim, therefore, involves the view that the Imperial Conference has the right to declare that any Dominion may at its pleasure secede from the British Empire. It may be that the right should be conceded, in which case, as India has been promised Dominion status, the basis will be laid for a truce between the parties in India who contend for Dominion status and those who demand full independence. But the immediate question is, What mandate has the forthcoming Imperial Conference to pronounce the opinion demanded by General Hertzog? Certainly the doctrine for which he contends was not conceded by the Imperial Conference of 1926, and the Imperial Conference of 1929 was so far from conceding it that it laid it down, with the assent of the representatives of the Union, that 'any alteration in the law touching the succession to the Throne, or the Royal Style and Titles, shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom'. If there were any doubt possible as to the meaning of this agreement, it is removed by the express admission of the Minister for External Affairs of the Irish Free State, who was a member of

the Conference, and who frankly admitted in the Irish Parliament that that Parliament could not affect by any action of its own the succession to the Throne.

General Hertzog, therefore, is demanding that the Conference shall nullify a resolution unanimously agreed to in 1929 on the strength of a vote in a single House of Parliament, which he could with difficulty carry in the Senate. In no other Dominion has any Parliament, or even any Lower House, claimed the right to secede, and the House of Commons has never been invited to express any view on the issue. The Imperial Conference, therefore, could not with any propriety concur in the proviso suggested by General Hertzog, and it is earnestly to be hoped that the issue will frankly be faced by the present Government, and that it will be made plain that no pronouncement on the issue can be made unless and until the question has been discussed in the Parliaments of the Empire.

## 66. THE DOMINIONS AND THE RIGHT OF SECESSION

*To the Editor of THE SCOTSMAN, 23 September 1930.*

As it seems that the way is being prepared for an admission of the right of secession as involved in Dominion status, and as India has clearly been promised Dominion status, it appears most desirable that the admission should not be unconditional. It should be accompanied by a proviso that any Dominion exercising the right of secession shall undertake (1) to fulfil any financial and commercial obligations existing towards the United Kingdom, and (2) to respect absolutely the terms of any loans raised in the United Kingdom and admitted to the status of trustee stocks. It will be remembered that the Imperial Conference on Dominion Legislation in 1929 admitted that the Imperial Government should continue to enjoy the power to disallow Dominion legislation impairing the security of holders of such loans, but the exercise of the right of secession would sweep away this safeguard.

The practical necessity of some such provision is seen in the fact that there is a widespread demand in India for the repudiation in whole or part of the obligations of that Empire both to the United Kingdom and to private investors, that the Trade Union movement in Australia supports the repudiation of the war debt to the British Government and of loans from British investors, while the Commonwealth Prime Minister is understood to be bent on securing the scaling down at least of Australia's war debt. There is, of course, the moral justification for these aspirations that the Irish Free State, despite its treaty engagements, has succeeded in forcing the cancellation of its obligation to bear a portion of the British debt; but there should be limits to the burdens imposed on the British public, and, if the right of secession is to be recognized, it is submitted that its exercise should not be encouraged by being made profitable from the financial point of view. It is not inappropriate to remember that the desire to be relieved of the burden of private indebtedness to British creditors played no small part in the secession of the American Colonies from the first Empire.

#### 67. PRIVY COUNCIL APPEALS

*To the Editor of THE SCOTSMAN, 3 October 1930.*

It is clear from the remarks of your London Correspondent that some confusion exists as to the question of appeals to the Privy Council from the Irish Free State. As matters stand at present Ulster traders can derive no profit from the existence of the right, and the real issue is whether the Free State is to be allowed to deny to the Privy Council the final decision of questions affecting the interpretation of the Constitution; for instance, issues of the protection of the Protestant minority from discrimination based on religious grounds, and the interpretation of the Treaty of 1921, which is the fundamental law of the Free State, and in respect of which the Privy Council has recently overruled the Supreme Court. These are matters

which might be assigned to the new body which may be devised to deal with inter-Imperial disputes, for it is impossible to accept the claim of the Free State to be the sole arbiter of the meaning of its treaty engagements. The Free State, of course, contends that it is willing to go to the Permanent Court of International Justice, but it is absurd to expect that the United Kingdom should consent to submit such an issue to the decision of a Court whose members are to an overwhelming majority foreigners.

In the case of the Union of South Africa, the appeal to the Privy Council could be abolished under the Constitution as it stands by a Union Act, though this would be resented by the Opposition, and General Hertzog has not committed himself to action in this sense. The Union is less opposed to the erection of a Court to deal with inter-Imperial disputes than is the Free State, but the difficulty arises of so framing its jurisdiction as to exclude the possibility of India bringing before it issues of the treatment of her citizens in South Africa. It must be remembered that the idea of such a tribunal was first mooted in respect of the illegal deportation, in 1914, of certain British subjects from the Union, and no Dominion is prepared to contemplate questions of immigration being referred to a tribunal.

In Canada, retention of the appeal depends not so much on popular sentiment—the appeal is the privilege of wealthy corporations—but on the support given to it by the Provinces—above all, Quebec, which regards it as assuring her privileges as to religion, language, and education under the Constitution, and by the fact that Canadian counsel now regularly act in London in respect of these appeals, and that they attach great value to the opportunity thus afforded of coming into close contact with the Metropolis and its legal life. The objections to it rest essentially on the feeling of loss of status; but, as the present Prime Minister recently pointed out, there is no immediate prospect of getting rid of the necessity of Imperial legisla-

<sup>1</sup> See Keith, *Imperial Unity*, pp. 165 ff.

tion to alter the Constitution of the Dominion, and it may fairly be argued that, while this is the case, there is nothing derogatory in retaining the appeal.

## 68. THE IMPERIAL CONFERENCE AND CONSTITUTIONAL ISSUES

*To the Editor of THE SCOTSMAN, 15 November 1930.*

General Hertzog's disappointment at the achievement of the Imperial Conference on constitutional issues is inevitable, since he pledged himself to his party to secure at the Conference recognition of the right of secession as inherent in Dominion status. A declaration of that kind could not have been made by his colleagues at the Conference, for the simple reason that not one of them obtained from his Parliament any expression of opinion in favour of such a step, and there are definite limits to the powers of Ministers to act in advance of public sentiment.

The only way in which real effect could be given to the desire of the Union and Free State Governments to be equal in status, both in theory and in fact, with the United Kingdom would be to confer on the Governors-General of the Dominions, selected by the Dominion Governments and nominally appointed by the King, the full Royal authority to receive and accredit Ministers, to make treaties, and to declare war, or neutrality, and make peace. Then each Dominion would be in effect an independent State, united by a mere formal personal union with the rest of the Empire. As it is, however much it may be laid down that the King is advised in matters affecting a Dominion by its Government alone, the reality cannot accord with the theory. Let us suppose that the King in future signs full powers to conclude treaties and instruments of ratification directly on the advice of a Dominion Minister, without the intervention of the Secretary of State for Foreign Affairs.<sup>1</sup> Does any person imagine that His Majesty, in any issue of

<sup>1</sup> See No. 79, *post*, and No. 8, *ante*.

serious character, would not feel bound to mention the matter to his Prime Minister in the United Kingdom, or that he would feel bound to act implicitly and without inquiry on the advice of a Ministry whose members and position he cannot, by reason of distance, know accurately? At present, the formal intervention of the Foreign Secretary secures to the Imperial Government the power to ask a Dominion Government to consider the effect of any proposed action on the interests of the Empire at large. On the new theory, the King himself would have to perform this function, and in effect this would mean in practice that his Private Secretary would have to be in communication with the Foreign Secretary on these issues. The fact is that, whatever form be adopted, the connexion of the Dominions with the Crown negates the absolute independence of action which belongs to a State existing in isolation, and it is the duty of statesmen to recognize facts.

## 69. THE IMPERIAL CONFERENCE AND SHIPPING

*To the Editor of THE SCOTSMAN, 1 December 1930.*

There is one matter only in which British interests are substantially affected by the conclusions of the Imperial Conference. The Statute of Westminster will duly accord to the Dominions full legislative authority over merchant shipping, a just and long-urged concession of autonomy, which removes the question from the constitutional sphere. But, as every part of the Empire will enjoy full legal authority to regulate shipping trading therewith, it is clearly essential that the exercise of this plenitude of legal authority should be regulated by agreement, if the result is not to be chaos. An agreement, accordingly, has been drafted, but it is impossible to regard the terms as in any way satisfactory. The net result of its numerous clauses is merely to urge uniformity of treatment, and the Governments of the Empire will fulfil their whole duty thereunder when they ask their Parliaments to adopt the principles therein laid down. Their Parliaments are left

with the decision, and in the Commonwealth, at any rate, it is certain that the Labour majority will insist on applying to all British ships trading with Australia the conditions which are imposed on ships registered in Australia and whose burdensome character ruined the governmental shipping enterprise.

It is clear that inter-Imperial comity requires that, subject to any international conventions, each part of the Empire should regulate its own registered shipping, and any ships whose trading head-quarters are in that part, for all purposes, and any ships whatever which engage in its coasting trade or fishing industry. Other British ships it should leave to be regulated by the legislation of that part of the Empire with which each is connected, while its Courts should be empowered to secure the enforcement of whatever regulations may apply to any ship, a point which has been abandoned in the agreement. Such an arrangement would respect equally the autonomy of the Dominions and of the United Kingdom, and would obviate a virtual grant of preference to foreign shipping. The present agreement stipulates that British shipping shall not be afforded less favourable treatment than foreign shipping, but it is perfectly clear that no Dominion could in practice impose on foreign ships the restrictions which it can impose on British ships, since, as exporting countries in great need of markets, the Dominions are singularly sensitive, as recent events in Australia have shown, to retaliatory measures in the form of tariff surcharges.

#### 70. THE APPOINTMENT OF GOVERNORS- GENERAL

*To the Editor of THE SCOTSMAN, 6 December 1930.*

It is clearly absurd of the Commonwealth Government to claim that the Imperial Conference of 1926 supported the idea of the appointment of Governors-General from local residents. The Conference did not touch the question of appointment, and it is well known that the then Prime Ministers



of Canada, the Commonwealth, the Union of South Africa, and New Zealand deprecated local selections. It cannot be too strongly emphasized that the parallelism between the Dominion Constitutions and that of the United Kingdom demands that the head of the Government should be free from suspicion of partisanship. Upon him depends in the last resort the maintenance of the balance of the Constitution and the protection of the territory from the misuse of ministerial power. To select, as has been done in Australia, a former convinced supporter of Labour, whose views have manifestly remained unaltered, is necessarily wholly improper. It is true that Sir Isaac Isaacs will endeavour to act impartially, but it cannot be expected that opponents of Labour will ignore the fact that in all likelihood he will have to determine the very delicate question of a double dissolution of the Houses of Parliament, nor will they forget that Labour nominees when acting as Governors in the States have flagrantly departed from the duty of impartiality. Thus the Acting Governor of Queensland swamped the Upper House in the face of the decision of the country by referendum against its abolition, and the Acting Governor of Tasmania assented to a Bill which had been passed by the Lower House only,<sup>1</sup> an unprecedented illegality, and one committed by an officer who was also Chief Justice.

The most unfortunate part of the matter is the unfair position in which His Majesty has been put. He should never have been advised to make a selection of a partisan character, with the alternative, if he refused to agree, that he would be vehemently attacked in Australian Labour circles. It may be added that, of course, it will rest with the present Opposition, if it should be victorious at the next election, to decide whether or not to advise the Crown to terminate the appointment of the Governor-General, who holds office during pleasure. This possibility is sufficient in itself to condemn action which General Hertzog, despite strong pressure, declined emphatically to take as regards the Union.

<sup>1</sup> Keith, *Responsible Government* (ed. 2), i. 489; ii. 1,246, 1,247

## 71. DOMINION GOVERNORS-GENERAL

*To the Editor of THE SCOTSMAN, 10 December 1930.*

Mr. Scullin's error lies in insisting, in the face of determined protests from the Opposition, on the appointment as Governor-General to represent His Majesty of a person whom the Opposition regard as a partisan. Despite the strongest pressure from the Nationalists in South Africa, General Hertzog had the courage to insist that the representative of the Crown should be one unconnected with the public life of the Union, and Mr. Scullin would have been wise had he taken the same ground.

If Mr. Isaacs was ever a member of the old Free Trade Liberal party, he must early have abjured that faith. When in office in Victoria he was a member of the Protectionist Ministry of Sir G. Turner, and when in office in the Commonwealth he was a member, not of the Free Trade Reid Ministry, but of the Protectionist Ministry of Mr. Deakin. That Ministry existed solely through Labour support, and Mr. Isaacs's views as a member thereof had the closest affinity with Labour aims. He was translated to the High Court along with Mr. Higgins, whose Labour affinities no one can dispute, and since then he has steadily and consistently maintained a view of the Commonwealth Constitution which is in harmony with Labour ideals. Most significant of all, he has defended energetically the Commonwealth Court of Conciliation and Arbitration, the question of whose continued operation was the vital issue leading to the fall of the late Government. The sincerity and ability of Sir Isaac Isaacs are unquestionable, but impartiality cannot be expected from men with deep convictions, held and acted upon for many years.

Needless to say, there was no necessity of selecting a British lord, open to the suspicion of class bias. This country could easily have supplied, had Mr. MacDonald been consulted, a Governor-General free from all suspicion of partiality, and of high distinction, whose age would have permitted him to

fulfil the duty of travelling freely about the Commonwealth, and thus serving as a link between the Crown and His Majesty's subjects overseas. There is, frankly, a certain absurdity in the doctrine that, when a judge is too old to serve on the Bench, he is ripe for the office of Governor-General, apart from the very grave objection to the creation of the possibility that in future judges may be influenced by the prospect of further preferment in the gift of the Executive Government.

## 72. THE GOVERNOR-GENERALSHIP OF AUSTRALIA

*To the Editor of THE SCOTSMAN, 10 January 1931.*

If the assumption of Sir E. Mitchell that the British Cabinet took no part in the appointment of the Governor-General of the Commonwealth of Australia is correct in the sense that no Imperial Minister participated in the appointment, then there is no ground to differ from his view that Sir Isaac Isaacs has not been duly appointed. The Letters Patent demand that the Governor-General shall be appointed under the Sign Manual and the Signet, and this requirement precludes action by any Minister who cannot control the use of the Signet. Assuming for the sake of argument that the Sign Manual could be affixed on the strength of a counter-signature by a Commonwealth Minister, still the Signet can be added only on the authority of the Secretary of State in whose control it is. It must, however, be presumed that Mr. Thomas has duly performed his part, and that therefore technically he has assumed responsibility, though the real advice tendered to the King was that of the Commonwealth Ministry through the Prime Minister. If not, the sooner the matter is remedied the better. The Letters Patent, of course, can be altered to eliminate any Imperial intervention, and doubtless that is the logical course to follow

## 73. AUSTRALIA'S DEBT TO BRITAIN

*To the Editor of THE SCOTSMAN, 10 February 1931.*

It is most disappointing to find that Mr. Scullin and Mr. Theodore consider that the funding arrangements between Great Britain and the United States justify an application to the British Government for a reduction of the Australian war debt, at the expense of the unfortunate British taxpayer. The treatment accorded to Australia in 1921 in respect of its indebtedness of over £92,000,000 was most generous. Australia pays interest at £4 18s. 4d. and sinking fund of £1 1s. 8d. per cent., spread over about thirty-five years, and most of us will agree with Mr. Bruce's declaration in 1927 that 'the only possible attitude in this matter for a self-respecting country like Australia is that we are prepared to honour every obligation into which we have entered'. All that he suggested was that the British Government might fix the rate of interest at the average amount which the United Kingdom was paying for its war debt, which he thought was £4 15s. per cent.; and this suggestion, which was based on a very dubious view of the facts, was rejected by the Chancellor of the Exchequer.

Mr. Hogan claims that the British Government should do all that it can to help Australia in her difficulties, and it is therefore relevant to point out that the British Government, again at the expense of the taxpayer, has already done much in this direction. It has gladly consented to maintain its burdens for the defence of Australia, while for her part the Commonwealth has abandoned her former efforts to supply an effective Fleet unit, has parted with her submarines, and has given up compulsory service. No contribution has been asked for in respect of Singapore, though New Zealand has readily recognized that it is her duty to contribute to a scheme dictated by the needs of Australasia. Moreover, the British Government has waived the carrying out of Australia's obligations under the migration agreement of 1925, permitting Australia to cease taking the settlers in whose interests the

agreement was made, while in Victoria itself the allegations of the unjust treatment of immigrants under the scheme have been so circumstantial and pressing that Mr. Hogan's Government has been forced to appoint a Royal Commission to investigate the facts.

It is consoling to find that Mr. Theodore's experience of the closing of the London money market to Queensland after measures of a confiscatory character<sup>1</sup> has convinced him that repudiation of debt would be ruinous to Australia. But it is clear that with the acquisition of their new status the question of the security for Dominion loans assumes a new aspect, and that the Treasury must reconsider and redefine the conditions on which Dominion stocks can be granted trustee rank.

## 74. THE CROWN AND THE DOMINIONS

### APPEALS TO THE PRIVY COUNCIL

#### *Irish Free State under New Statute*

*To the Editor of THE TIMES, 16 November 1931.*

While it is easy to sympathize with Lord Carson in his desire to secure the interests of the Protestant minority in the Irish Free State, it seems clear that it would be wholly impossible to conserve their interests by any provision in the Statute of Westminster. The Treaty of 1921 cannot be interpreted by the British Parliament, and the question whether the appeal to the Privy Council is implicit in the treaty is a purely legal issue. The Privy Council has ruled that it is implicit; but that ruling was doubtless based in large measure on the fact that, when it was given, the Parliament of Canada had no power to abolish the appeal by special leave from the Supreme Court to the King in Council. If, as on one view, the result of the Statute of Westminster is to permit the Dominion to abolish the appeal, it seems probable that the Privy Council itself would be bound to hold that under the treaty the Free State

<sup>1</sup> See Keith, *War Government of the British Dominions*, pp. 258 ff.; *Responsible Government* (ed. 2), ii. 768, 769.

had acquired the like power, for it has been consistently held by both the British and the Free State Governments that the true meaning of the treaty is that the Free State can do anything which Canada has the right to do, whether Canada exercises the right or not.

But, apart from legal right, the question is whether the retention of the appeal is really in the interest of the minority. Would it not be better to make the decision of the Supreme Court final, and thus to remove one topic of incessant friction between the two Governments? The Irish Free State has shown no disposition to violate the safeguards for the minority, nor, if it desired to do so, need we assume that the Court would fail to afford due protection. But in any event there would remain to the British Government, if it held that the treaty rights of the minority were being violated, that it could demand arbitration of the issue. The one concession which the Free State might well be asked to make is that it should formally agree that any question of the interpretation of the treaty should be referred to an inter-Imperial tribunal, of the type discussed at the Imperial Conference of 1930, and should not reserve any right to refuse arbitration or to insist on an international tribunal.

The only enduring basis of Imperial co-operation is equality, and this implies settlement of disputes by arbitration, and not by the decision of a tribunal representing essentially the United Kingdom. Moreover, what applies to the Free State must ultimately be the model for relations between India and the United Kingdom, a fact which makes a wise settlement of the present issue of the greatest importance.

#### 75. THE STATUTE OF WESTMINSTER: ANGLO-IRISH TREATY RIGHTS

*To the Editor of THE SCOTSMAN, 16 November 1931.*

Lord Carson's suggestion of the safeguarding of the Anglo-Irish Treaty of 1921 in the Statute of Westminster is clearly

impracticable. The British Parliament cannot derogate from any rights which the Free State has under the Treaty, and the question of the right of appeal must rest on the interpretation of that instrument. The British negotiators most unfortunately failed to deal with the issue, despite its fundamental importance, in the treaty itself, and the Irish Free State can, with some show of justice, argue that it cannot be expected to accept as decisive as to the existence of the right as a matter of treaty obligation the pronouncement of the Privy Council as to its own competence. Moreover, and this is the insuperable difficulty, the British Government has from the first admitted that the Free State is entitled on all matters not specifically regulated in the treaty to the rights of Canada. If, therefore, as may well be held, the effect of the Statute is to allow the Dominion to abolish any appeal from the Supreme Court to the Privy Council, it follows that the Privy Council itself would rule that the Irish Free State has the power to cut off any appeal from its Supreme Court. The Irish Free State's view of its right to abolish the appeal may thus be consistent with the treaty even in the view of the Privy Council itself.

It will be seen, therefore, that such action by the Free State is irrelevant to the question of its duty to honour its obligations under the treaty in respect of aid of certain kinds for defence purposes. It can be relieved of these obligations merely by change of the treaty. In like manner the safeguards for Protestants cannot be lessened by the Irish Free State without violation of the treaty. If they were not being enforced by the Supreme Court—and of this no suggestion has yet been made—the British Government can take the matter up and demand arbitration. What is really needed is the explicit acceptance by the Free State of the obligation to arbitrate on request, and to accept an inter-Imperial tribunal of the type discussed at the Imperial Conference of 1930. This is a concession which the British Government, which has recently made concessions of authority in external affairs of the most far-reaching kind,

ought to be able to secure if the Free State really desires to respect its obligations.

The whole history of the appeal question is suggestive of the danger which lies in the proposal that European commercial rights should be safeguarded merely by statutory prohibitions to be interpreted by the Indian Supreme Court with appeal to the Privy Council.<sup>1</sup> The result will be that any reversal of a Supreme Court decision by the Privy Council will be denounced as an unjust interference with the authority of the Supreme Court, and maintenance of the appeal will become impracticable. It will be most unfortunate if this proposal supersedes that accepted on January 19 by the Round Table Conference, under which the rights of Europeans would be secured by a convention, based on reciprocity, whose interpretation would rest with an inter-Imperial tribunal.

## 76. THE TERM BRITISH COMMONWEALTH OF NATIONS

*To the Editor of THE SCOTSMAN, 26 November 1931.*

While one sympathizes with the Solicitor-General in the thankless task of explaining away the many ambiguities of the Statute of Westminster, it is unfortunate that he should have added a fresh perplexity to the number in asserting that the well-known term British Commonwealth of Nations is the accurate description of the autonomous Dominions as a part of the British Empire. Strange to say, Mr. Thomas seems to have concurred in this statement, and to believe that this is the meaning of the term when used in the Balfour Declaration of status. In fact, of course, the term is derived from the Irish Treaty of 1921, where it is synonymous with the term British Empire, and this use has been constant ever since. The Solicitor-General might have remembered that the Agreement of 1931 as to Commonwealth Merchant Shipping uses the term British Commonwealth of Nations to cover the

<sup>1</sup> See II, Nos. 19, 31, 40, and 41, *post*.



United Kingdom and India, and that the Imperial Conference of 1930 recommended the setting up of a Commonwealth Tribunal, which is not to deal with disputes between the Dominions only, but also with disputes between the United Kingdom and a Dominion or a Dominion and India.

The true force of the term is one of aspect. It is used when the whole mass of the territories of the King are regarded as falling into co-equal and autonomous sovereignties, of which the United Kingdom is but one. That is perfectly clearly the sense in which it is used in the preamble to the Statute of Westminster, and nothing but confusion can result if its meaning is suddenly to be restricted, with the inevitable suggestion that the Dominions are not really, as they claim to be, on the same footing within the Empire as the United Kingdom so far as formal sovereignty is concerned.

## 77. THE OTTAWA CONFERENCE RESULTS

*To the Editor of THE SCOTSMAN, 22 August 1932.*

There are two constitutional aspects of the Ottawa Conference results which deserve to be stressed.

In the first place, there has been a unanimous reassertion of the doctrine laid down by the Imperial Conference of 1926 that the relations of the several parts of the Empire are not governed by the principles of international law. If that were not the case, the whole system of inter-Imperial preferences would be impossible, as the operation of the most-favoured-nation clause in treaties with foreign Powers would render it nugatory. There is no doubt that the rapid development of Dominion international status of late might have threatened this position, and it is most satisfactory that economic considerations have brought about recognition of the grave character of interfering with this measure of unity.<sup>1</sup> Clearly the Conference resolution strengthens the case of the British Government in insisting that, while the tribunal to

<sup>1</sup> See No. 8, *ante*.

deal with the land annuities issue may be constituted otherwise than as contemplated by the Imperial Conference of 1930, the Irish Free State cannot expect derogation from the principle that foreigners cannot act as arbitrators in an inter-Imperial dispute.

Secondly, the action of the British Government in bringing the Colonies and Protectorates into the proposals is a welcome reminder that these territories are in essential connexion with the Dominions as parts of the same Empire, whether or not they are regarded as belonging to the British Commonwealth of Nations. It may be taken from the phraseology used that the circumstances of each of the Colonies will be duly considered before they are actually brought into the schemes prepared.

#### 78. THE FIVE-YEAR LIMIT FOR THE OTTAWA AGREEMENTS

*To the Editor of THE SCOTSMAN, 20 October 1932.*

May I call attention to certain considerations to which sufficient regard hardly appears to have been paid in the recent discussions on the five-year limit for the Ottawa agreements?

(1) A treaty with a foreign State and an agreement with a Dominion are equally binding, though the obligation in the former case is international, in the latter inter-Imperial. Parliament may refuse to honour such agreements; in the case of a treaty, an arbitral tribunal or the Permanent Court will then adjudicate on the breach; in the case of an agreement an inter-Imperial tribunal will act or there will be retaliation, as in the case of our dispute with the Irish Free State. It is in either event deplorable that a contract should be broken, and Parliament will always be most anxious to avoid international or inter-Imperial default.

(2) It follows therefore that no Government should pledge itself in such a way that it cannot reasonably expect to be able

to carry out. This has clearly been the criterion in all the cases of treaties concluded for a period of years yet adduced. When the great parties in the State are agreed on a line of policy, it is obvious that a duration of considerable length is just and proper; but, even when Free Trade was our national doctrine, it is to be noted that the Government of 1890 when it promised Greece a low duty on currants limited its obligation to proposing the reduction to Parliament, which accorded unhesitating approval. The German Treaty of 1924, which has a minimum duration of five years, was concluded by a Conservative Government, with the hearty approval of the leader of the Labour party, and represented an agreed policy. The new Greek Treaty of 1926, with its concession for currants, was limited to three years, and again was an agreed measure.

(3) Now that we have two definitely opposed policies, it seems clear that the only fair doctrine is that no Government should pledge the country beyond the normal period which it can expect to remain in office with the existing Parliament. Otherwise a Labour Government might pledge itself to Russia or some other Power in a way as distasteful to Conservatives as the Ottawa agreements are to Sir Herbert Samuel. Judged by this criterion, the five-year period of these agreements is on the whole not unreasonable, for the present Parliament has a normal expectation of life of four years' activity, and it may be claimed that an extra year is not excessive, to allow for consideration of readjustment. For Australia, with its three years' Parliament, the case is different, and Mr. Scullin is probably justified in his strong criticisms, nor is the case of Canada without difficulties. It is probable that it would have been wiser to restrict the period even in that case to three or four years, but that is a matter which the Dominion Governments had to decide for themselves. It must, however, be remembered that agreements with the Dominions are valuable only so long as they are welcome to the great masses of people here and in those territories, and there is every reason for

making such agreements as flexible as possible, a principle which the Dominions *inter se* regard as absolutely vital.

## 79. THE INTERNATIONAL STATUS OF THE IRISH FREE STATE

*To the Editor of THE SCOTSMAN, 19 January 1932.*

The handing over to the Free State of its new Great Seal by the King, recorded in your Court news to-day, marks the final establishment of the complete international sovereignty of the Free State and the elimination of any British control. Hitherto<sup>1</sup> the Free State has been subject to the restriction, applicable to the other Dominions, that full powers to sign treaties and the King's ratifications of treaties have been passed under the Great Seal of the Realm, which can be affixed only on the authority of a British Minister, a procedure which attested the maintenance of the diplomatic unity of the Empire. With the elimination of this intermediary, and the introduction of the practice of direct relations with the King either through the Minister for External Affairs personally or the High Commissioner, the Free State emerges as united to the United Kingdom solely through the possession of the same Sovereign, on the basis of the Treaty of 1921.

The position of the King under the new régime is inevitably different from his position towards the Government of the United Kingdom. History, the loyalty of his people, and his constant concern actively with all important affairs of government give the Sovereign as regards United Kingdom affairs a definite measure of authority, as opposed to formal power. In the case of the Free State, it has been made clear by the Government that the King is expected to act automatically on the advice of Ministers as does the Governor-General in internal affairs, and it would be obviously fatal for His Majesty to endeavour to guide in any degree Irish Ministers. On the other hand, it may be hoped that the Irish theory will in

<sup>1</sup> See Nos. 8 and 68, *ante*.

practice be realized, and that complete freedom will result in a cordiality of co-operation in external issues which is stated to be impossible as long as any appearance of superior authority remains.

It may be hoped that the system will now be completed by Irish readiness to accept agreement to refer to an Imperial tribunal any issues as to the interpretation of the Treaty of 1921 which may arise between it and the British Government. It is now obvious that retention of the right of appeal to the Privy Council is impossible, and its formal abolition by a fresh treaty might well be included in connexion with an agreement of the type suggested.

That this most important change should have been made without the slightest attempt by the British Government to explain matters to the House of Commons is singularly unsatisfactory, and it is fortunate that Mr. M'Gilligan, to whom the carrying out of the scheme is largely due, should have remedied the omission of Mr. Thomas. Lord Balfour in 1926 thought that equality of status could be combined with differentiation of function, but this claim was illogical, and the Irish action is doubtless the inevitable sequel of the Conference of 1926.

## 80. IRELAND AND INDIA

### THE OATH AND DEBT QUESTIONS

*To the Editor of THE SCOTSMAN, 22 February 1932.*

There will be no tendency to take too seriously the abolition of the Oath required under the Constitution of the Irish Free State. Mr. de Valera's attitude proves that the Oath has no value, and his technical argument in favour of the power to eliminate it is distinctly of the same type as Mr. Cosgrave's attitude towards the appeal to the Privy Council, while the substantial importance of the appeal was far greater than that of the Oath.

For withholding payment of the sums due in respect of land

annuities, Mr. de Valera can cite the success of the present Government in securing exemption from payment of Ireland's due share of the British National Debt, and in compelling the British Government to pay a part of the compensation which it owed under the Treaty to Irish Civil Servants. Why, he may well ask, should the British Government not continue in the path of wholesale surrender of British rights in the interests of inter-Imperial amity? The chief objection to the indefinite continuation of the policy is its effect on India. Practically the whole of Indian political opinion is agreed that, on the analogy of the treatment of the Free State, the United Kingdom ought to shoulder the burden of a very large portion of Indian indebtedness. It is, indeed, logically impossible to distinguish between the two cases, and the much suffering British taxpayer had better make up his mind that, if the British Government cannot make good its claims against the Free State, it will be necessary for him at no distant date to face the obligation of responsibility for much of the debt of India. It is not an enlivening prospect, but it seems foolish to ignore it.

#### 81. MR. DE VALERA AND THE OATH

*To the Editor of THE SCOTSMAN, 30 March 1932.*

Is there not a tendency both on the part of Mr. Thomas and of the Independent Labour party to exaggerate the importance of the issue as to the oath taken by members of the Irish Free State Parliament? It seems to me a very small item in the issue of the relations between the United Kingdom and the Free State, which are in vital matters clearly laid down in the Treaty of 1921 and its subsequent modifications and explanations, including the Statute of Westminster. What practical effect would the disappearance of the Oath from the treaty as well as the Constitution have upon relations between the two countries? Certainly there would be no change in constitutional relations.

Mr. de Valera, of course, is utterly wrong in his mode of

procedure by unilateral action, and his only excuse is that he is advised that the treaty does not impose the duty of taking the oath, but merely defines its terms if an oath is to be taken. This is a view which will hardly approve itself to judicial minds, and, even if the Senate agreed to eliminate the Oath, the Supreme Court might find itself bound to rule the abolition invalid, for the Constitution is subject to the treaty. Common sense suggests that Mr. de Valera should seek to negotiate an agreement to alter the form of oath, and to substitute his own famous proposal 'that for purposes of the association (of Ireland with the States of the British Commonwealth) Ireland shall recognize His Britannic Majesty as head of the association'. But the really important thing is that the British Government should concentrate on securing arbitration of an inter-Imperial character on the issue of the land annuities; that is a matter of practical importance, and a deplorable precedent will be set for the Dominions and India alike if it becomes accepted that debts due to the United Kingdom or to United Kingdom subjects can be repudiated at pleasure. Moreover, a pecuniary issue is one which essentially lends itself to impartial handling, and refusal to accept arbitration would be tantamount to an admission that the Free State had no case.

## 82. MR. DE VALERA AND THE OATH

*To the Editor of THE SCOTSMAN, 23 April 1932.*

Mr. de Valera has evidently decided to challenge once and for all the validity of the Treaty of 1921 and the constitutional provision forbidding its violation. This goes far beyond his original contention that the treaty did not impose the Oath, and that it could legally be removed from the Constitution. He has probably realized that in point of law his position is untenable, so long as s. 2 of the Constitution Act, No. 1, of 1922, provides that no amendment of the Constitution can override the Treaty, and that he must therefore secure

the removal of that clause. But it is clear that the method attempted, simple repeal by an Irish Act, is legally absolutely void. The Irish Free State Parliament has only such legislative authority as was granted to it by the Constituent Assembly, representing the will of the people, in 1922, and the judges are sworn to uphold the Constitution as by law established. They must therefore, when the issue comes before them in due course, rule invalid the attempt to overrule s. 2 of the Act of 1922, or be false to their duty. The Governor-General also will be placed in a very difficult position if he is asked to assent to the Bill, for it is one thing to assent to a measure of doubtful legality, another to accept one whose illegality is patent and deliberate.<sup>1</sup>

Mr. Cosgrave's suggestion is clearly sound, and the Senate has the power to bring pressure on the Government to adopt it. There is room for accommodation on the issue of the Oath if Mr. de Valera is prepared to revert to his own proposal in 1922, and the Ottawa Conference affords an obvious opportunity of using the combined wisdom of the Governments of the Empire to reach accord. If the Free State will not compromise then no doubt there will be no alternative to separation, but Mr. de Valera's majority is ludicrously inadequate to justify his carrying the matter to extremes, while the British Government could, without serious injury, consent to modification of the Oath so long as the King remains an essential element in the Constitution.

### 83. MR. DE VALERA AND THE OATH

*To the Editor of THE SCOTSMAN, 28 April 1932.*

Mr. de Valera is well acquainted with American affairs and has often expressed his admiration of the republican constitution of the United States. It is therefore remarkable to read his denunciation of making municipal law dependent upon treaties, for his favourite Constitution provides that 'all treaties made, or which shall be made, under the authority of the

<sup>1</sup> Hence he was removed from office, see Nos. 38 and 39, *post*



United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding'. From this, of course, is derived the principle which the Constituent Assembly enacted as abiding law for the Free State.

Mr. de Valera's argument from Mr. Lloyd George's explanatory letter to Mr. Griffith unfortunately breaks down on the vital issue. Mr. Lloyd George admitted that any extension of the status of Canada as it existed in 1921 would enure to the benefit of the Free State. If, therefore, Mr. de Valera's assertion that the Parliament of Canada could abolish the Oath required under the Dominion Constitution were true, he would have a strong case for arguing that the Irish Free State was entitled to abolish the taking of an oath, for it could then be argued that the treaty provision for the Oath was intended to prescribe the special form differing from the Canadian, and that it could not be read as forbidding abolition if and when Canada had that power. But the Parliament of Canada has no power whatever to abolish the Oath; it is expressly forbidden to amend the British North America Acts by the Statute of Westminster, and Mr. de Valera's assertion is therefore wholly incorrect and his argument unsound. The fact, of course, that the Union of South Africa could abolish the oath affords an argument for approaching the British Government for a reconsideration of the issue of the Oath, the practical value of which appears to be negligible, and it is certainly most unfortunate that Mr. de Valera's legal advisers have not pointed out to him that this is the one simple and honest course of action.

#### 84. MR. THOMAS AND MR. DE VALERA

*To the Editor of THE SCOTSMAN, 6 May 1932.*

It is rather surprising and disappointing to find that Mr. Thomas is not prepared to suggest reference to an Inter-

Imperial tribunal, of the type suggested by the Imperial Conference of 1930, of the issue of the legality of the proposed omission of the Oath from the Irish Constitution. The suggestion of the Permanent Court of International Justice, of course, is a very different thing, and could not possibly be adopted without running counter to views which have been consistently held by successive British Governments, and which are on the whole generally approved in the Dominions. But an inter-Imperial tribunal seems the only proper manner in which issues arising between autonomous kingdoms, parts of the same Commonwealth of Nations, can be justly decided, and the British Government would strengthen its position if it adopted the policy of proposing reference to such a body. Mr. de Valera would then be compelled either to admit that he has no case by refusing to accept the reference, or to agree to the proposal. In the latter event we would have a pronouncement which must be honoured by both parties.

It must be remembered that during the discussion of the Statute of Westminster Mr. de Valera's action was clearly anticipated as probable, and Sir Stafford Cripps, doubtless with the present contingency in view, was insistent on the wisdom of organizing the system of reference to an inter-Imperial tribunal as a necessary complement to the extension of Dominion autonomy by the Statute.

## 85. AN IRISH REPUBLIC: EFFECTS ON NATIONALITY

(MANCHESTER GUARDIAN, 2 May 1932.)

A good deal has been said of late regarding the position of citizens of the Irish Free State in the United Kingdom in the event of a formal separation of the Free State from the British Commonwealth of Nations. It has, however, seldom been recognized how very complex the issue is, and quite often the

effect of such a separation has not been correctly stated. It may, therefore, be worth while to consider the position from the purely legal and constitutional aspect.

It is essential, in the first place, to realize that at present the Irish Free State is a kingdom, totally independent of the United Kingdom, and connected with it merely through the possession of a common sovereign and by the terms of the Treaty of 1921. This is the result of the Statute of Westminster as regards internal affairs, and in external affairs of the decision of the British Government in 1931 to sanction the creation of an Irish Seal to replace the Great Seal of the Realm for use in the instruments requisite for international intercourse. His Majesty, as King of the Irish Free State, cannot be advised by any save Irish Ministers, and the British Government has no power of intervention in Irish affairs. The only possibility of further separation lies in the declaration of a republic and the termination of the Crown as part of the Irish Constitution. This step, it must be noted, cannot legally be taken under the Constitution of the Irish Free State. The Constituent Assembly of the Free State definitely enacted that the Treaty of 1921 is superior to any provision of the Constitution and of any amendment thereof, and the Irish Free State Parliament cannot, therefore, legally pass any enactment which runs counter to the Treaty. Any such measure which purported to have been passed, even if assented to by the Governor-General, would have to be held invalid by the Irish courts as a mere matter of law. If, therefore, there were to be separation, it must be brought about in one of two ways. Either the British Government must agree to the abrogation of the Treaty or the Irish Free State must deliberately declare the Treaty ended, abandon its present Constitution, and as a new State provide itself with a new Constitution.

#### RESULTS OF IRISH ACTION

If the matter were determined by a new treaty, no doubt that instrument would contain definite provision for the regu-

lation of the position of Irish citizens in the United Kingdom and vice versa. But if the separation were effected extralegally by unilateral action, issues of difficulty would at once present themselves. It has been freely assumed that the result of such a declaration of independence would be to deprive Irish citizens of the status of British subjects, both in the United Kingdom and throughout the Empire, and to endanger their right to hold positions in the British Civil Service, to be owners of British ships, to enjoy the franchise, and to profit by pension legislation. This, however, rests on a misunderstanding. The separation of a part of the Empire by revolutionary action is, unhappily, not unprecedented, and some guidance can also be drawn from the conditions which arose when the union of the Crowns of the United Kingdom and Hanover terminated on the accession of Queen Victoria. The decisions of the British courts show clearly that a declaration of independence would have no effect on the nationality of British subjects—and the vast majority of Irish citizens are British subjects—unless and until independence were recognized by the British Crown. If, then, we assume that recognition was accorded, without any treaty being agreed to regulating the issue of nationality, then the British courts would no doubt hold that all British subjects resident in the Free State who remained there on the declaration of independence had ceased to be British subjects. They would probably be willing to hold also that British subjects whose domicile was in the Irish Free State, and who claimed to have ceased to be British subjects, had lost their British nationality. But they would certainly have the gravest difficulty in holding that Irish citizens who were resident in the United Kingdom, or in any other part of the Empire, on the declaration of independence had ceased in law to be British subjects.<sup>1</sup>

To put it quite simply, the condition of a British subject is conferred by British legislation, extending the common law of England; that legislation cannot be altered for the United

<sup>1</sup> See Keith, *The Theory of State Succession*, ch. vi.

Kingdom by any legislation of the Irish Free State. No State has any right under international law to expect any other State to give effect to the laws of the former on the territory of the latter, and if any persons who under existing British legislation are British subjects in the United Kingdom are to be deprived of that status, it must be as the result of an alteration by the British Parliament of British law. It cannot seriously be supposed that the British Parliament would legislate against persons resident in any part of the British Empire outside the Irish Free State who were British subjects at the moment of separation and who desired to continue to be British subjects.

#### IRISH IMMIGRATION

Irish citizens who remained identified with the Free State would, on the other hand, become aliens pure and simple, and would be exposed to the limited disabilities which are imposed on aliens in the United Kingdom. In addition to such issues as those of the franchise, employment in the services, and pension legislation, they would be subject to one very important restriction, that on the immigration of aliens. This matter, of course, has hardly appeared as a serious issue in England, but it has evoked prolonged investigations in Scotland. There has grown up a very strong feeling in that part of the United Kingdom that the freedom of entry accorded to Irish citizens on the score of British nationality operates seriously to the disadvantage of the Scots people, that cheap Irish labour depresses the standard of living, and that the immigrants are responsible for a disproportionate amount of crime, while they resort far too readily to the benefits of public assistance, and thus impose a grave burden on the community. No doubt the demerits of the immigrants have been exaggerated, but it is equally impossible to ignore the danger to Scottish interests from this immigration. It is clear that if Irish citizens ceased to be British subjects it would be quite impossible to resist the growing strength of Scottish opinion in

favour of the exclusion from the country of all immigrants who are not likely to add to the prosperity and moral value of the population.

## 86. THE IRISH SITUATION

*To the Editor of THE SCOTSMAN, 11 June 1932.*

As we are to have a debate on Irish affairs, may I suggest that attention should be paid to the following points, in view of the confused state of Dominion as well as British opinion on these issues?—

(1) It seems to be widely thought that in some way the Bill passed by the Dáil affects the allegiance of Irish citizens to the Crown. This is clearly a complete misunderstanding. Allegiance is part of the common law of the Irish Free State, and is wholly unaffected by the fact that it is desired to remove from the Constitution the obligation on members of Parliament to take an oath of allegiance.<sup>1</sup> The allegiance and its obligations will stand as securely under the law even if the Oath were to disappear—a fact which, incidentally, explains why many loyal Irish citizens contemplate the possibility of removing the Oath, if that can be done without breach of the Treaty of 1921.

(2) Mr. de Valera's claim that the Oath can be removed without breach of the Treaty rests on a far stronger basis than is often admitted. Indeed, if it were true, as he has asserted, that under the Statute of Westminster Canada could omit from her Constitution any oath, I think it might quite fairly be argued that the Free State was entitled to the right conceded to Canada, and that the removal of the Oath was thus a purely domestic issue. Unluckily for Mr. de Valera, the Statute gives no such power to Canada directly, though Canada might by petitioning the Imperial Parliament secure the deletion of the Oath if Canadian opinion became hostile to it. This fact of the

<sup>1</sup> This doctrine was accepted by Sir Stafford Cripps, *Parl Deb*, cclxvii. 668 See Nos. 102-5, *post*, for the repeal of the common law.

power to petition, coupled with the undoubted power, e.g., of the Union of South Africa of its own authority to eliminate an oath, would strongly support a request from the Free State for British concurrence in its omission, but it clearly does not give the State a legal power of abolition.<sup>1</sup>

(3) If the omission of the Oath is really strongly objected to by the British Government, cannot it offer to compromise on the famous alternative form once suggested by Mr. de Valera himself? But, seriously, is the retention of the Oath of any real value to the Crown or any one?

(4) If no agreement can be reached, is it not obligatory on the British Government to propose reference to an inter-Imperial tribunal, such as was suggested by the Imperial Conference of 1930, both of the issue of the Oath and of that of the land annuities? Then the onus of refusal would be put on the Free State.

## 87. MR. DE VALERA AND THE GOVERNMENT

### THE LEGAL ISSUES

*To the Editor of the MANCHESTER GUARDIAN, 18 June 1932.*

It is most unfortunate that the legal issues involved in the Irish question should so ineffectively have been dealt with in the debate yesterday. Sir R. Mitchell Banks seems to countenance the supposition that the removal of the Oath from the Constitution would affect the allegiance of members of the Dáil, which is clearly an illusion. Mr. Thomas insists that Mr. de Valera's Bill takes away the right of Irish citizens to challenge in the courts the validity of the proposed abolition of the Oath, forgetting that it is for the courts to decide whether Mr. de Valera's Bill, if passed as he desires, would be valid, and that it is impossible for the Legislature to deprive the courts of the power to decide as to the legality of the Oath. Mr. Thomas,

<sup>1</sup> See No. 106, *post.*

again, objects to Mr. de Valera's suggestion of reference to arbitration of the obligations of the annual payments made by the Free State, so far as not ratified by legislation, in addition to the issue of the annuities; but this is surely an indefensible position. The agreement of 1930 clearly covers any such issue, however plain the British case may seem, and it is decidedly unfortunate that the British Government should seem to refuse to arbitrate a justiciable question. If the British case is sound—as it probably is—why not consent to let it go before a tribunal?

On the question of the personnel of the tribunal the agreement of 1930 is unequivocal in providing that the tribunal shall be constituted of five members, none of whom may be drawn from outside the Commonwealth, two to be selected from other members of the Commonwealth than the parties to the dispute, two without limitation, the four selecting their chairman. Mr. de Valera could thus have two nominees of his own, the British Government two, and the fifth would be selected by the agreement of these four. It will appear to most minds that this is an absolutely fair arrangement and that Mr. de Valera's position is unwise. But it must be remembered that the late Government of the Free State claimed the right to have recourse in inter-Imperial issues to the Permanent Court of International Justice, and Mr. de Valera has gone so far in accepting the principle of arbitration that with further reflection he might be induced to go farther. At least it is good to find the British Government seriously taking up arbitration, and an obvious compromise would be for the latter to agree to widen the scope of arbitration, and for the Free State to accept a purely Commonwealth tribunal.

On the issue of the Oath Sir S. Cripps has gone so far as to maintain that Mr. de Valera can abolish the Oath without reference to the British Government—that is, that the Treaty has been so modified by the agreement of the Conferences of 1926 and 1930 as to render British agreement superfluous, and



that legally the Free State has, since the passing of the Statute of Westminster, an absolute right to abolish the Oath. This contention is of fundamental importance, but it still appears to me to be unsound in strict law. The Statute of Westminster, it is true, does enable the Irish Legislature to repeal the Imperial Acts of 1922 ratifying the agreement of 1921 and approving the Constitution of the Free State. But that is not the question. The Irish Legislature is the creation of an Irish Constituent Assembly which definitely restricted the power of the Legislature to amend the Constitution established by the constituent body to changes consistent with the Treaty of 1921.

The legal issue, therefore, is whether the omission of the Oath is consistent with the Treaty. *Prima facie* the answer is in the negative, for the argument once used but now apparently not pressed by Mr. de Valera that the Oath is not mandatory in the Treaty can hardly be taken as valid. Does the Statute of Westminster alter the position? If so it can only do so indirectly in the following manner. The Treaty gives the Free State the status of Canada, and if the Statute gave Canada the power to abolish the Oath then the Free State might claim that under the Treaty itself the grant of Canadian status operated to confer the increased powers of Canada and so permitted the deletion of the Oath. The fatal objection to this view is the fact, which Sir S. Cripps admits, that Canada cannot under the Statute abolish the Oath except with the co-operation of the British Parliament, and it appears, therefore, clear that legally the Free State remains bound to maintain the Oath until the Treaty is modified by consent. But it is fair to point out that, if Canada should ask for the omission of the Oath, the United Kingdom would be constitutionally under obligation to accept omission, and Mr. de Valera would have put himself in an infinitely stronger position if he had asked the Senate to combine in requesting the omission of the Oath, for the British Government could not, I think, have refused compliance on any constitutional ground.

## 88. THE GOVERNOR-GENERAL OF THE IRISH FREE STATE

### HIS CHANGED POSITION

*To the Editor of the MANCHESTER GUARDIAN, 12 July 1932.*

Mr. McNeill's statement that he knows that the President of the Council in possession of a majority in the Dáil can secure his removal from the office of Governor-General calls attention to one of the many grave problems created by the new Constitution of the Empire.

The Governor-General of a Dominion under the old régime, as head of the Dominion Government, owed his appointment to the King on the advice of the British Government, though the Dominion Government concurred informally in his selection, and could be removed prior to the normal expiry of his tenure of office only on similar advice. He was thus independent of the Ministry of the day, and could play the part of a safeguard of the Constitution in the same way as the King in the United Kingdom.

The result of the Imperial Conference of 1930 was to bring about the surrender by the British Government of the right of recommendation to the King, as was shown in the appointment of the present Governor-General of the Commonwealth of Australia. On the other hand, the necessity of passing his instrument of appointment under the Signet required the intervention of the Secretary of State, and thus secured British participation in the appointment. In the case of removal from office it seems clear that, under the existing arrangements, the Governor-General can be deprived of office on the recommendation of the Executive Council, and that the Crown could not resist such a recommendation.

The result is clear: the Dominion loses all the advantage to be derived from the possession of an impartial representative of the Crown, and the Constitution is left without safeguard. It is very dubious if the Conference of 1930 realized the

implications of its attitude, which was certainly not understood by public opinion in the Dominions. That the Government of the moment in a Dominion should have unrestricted authority is dangerous—how dangerous may be realized by reflecting what would now be the position in Australia had Mr. Lang had the power of ridding himself of the Governor and putting in a partisan to wage war with the Commonwealth on the debt issue.<sup>1</sup>

The actual issues involved in the dispute seem perhaps rather trifling, and it may be regretted that accommodation was not secured on the lines of Mr. de Valera's letter of April 30, which was perhaps meant to be more conciliatory than the Governor-General held it to be. The publication of the correspondence against the advice of the Council was perhaps unwise, seeing that a statement might have sufficed, but the Council clearly acted unwisely in refusing assent to its issue when the Governor-General pressed the point.

#### 89. MR. DE VALERA AND THE CROWN

*To the Editor of THE SCOTSMAN, 4 October 1932.*

No more effective manner of discrediting the position of the Crown in the Irish Free State could well have been devised by Mr. de Valera than his action in compelling the King to dismiss from office a Governor-General against whom his only ground of complaint was that he had taken exception to the deliberate efforts of Ministers to show him disrespect because he represented the Crown. That His Majesty acted constitutionally in accepting the advice tendered is as clear as that there is pressing need to eliminate the possibility of the Crown being again compelled to dismiss an officer whose one fault is loyalty to his office. The episode shows how completely the balance of the Dominion Constitutions has been upset by the adoption in 1930 of the new principle of appointment by local governments. The safeguard provided for the British Con-

<sup>1</sup> See Keith, *Constitutional Law of the British Dominions*, pp. 158, 159.

stitution by the independent position of the King has been discarded for the Dominions and nothing invented to replace it, and it must be admitted that the Imperial Conference of 1930 appears to have been quite unconscious that its action was revolutionary.

Mr. de Valera's material motive for action, first to secure the voluntary resignation of the Governor-General, and later to remove him from office, is obvious. His Bill to remove the Oath from the Constitution includes the removal from that instrument of the rule that the Constitution is to be read subject to the Irish Treaty as the supreme law of the land. Now it is clear that the Bill is *ultra vires* the Irish Legislature, which is not a fully sovereign body but was accorded by the Constituent Assembly a strictly limited power of constitutional change. It is plain that a Governor-General who is sworn to maintain the Constitution could not assent without breach of duty to such a Bill, and that to secure assent there must be placed in office a partisan of Mr. de Valera who will feel no compunction in assenting to a Bill however much it may violate the Constitution which he is sworn to maintain.<sup>1</sup> If Mr. de Valera is satisfied that the Free State desires Republican status, it is greatly to be hoped that he will obtain a mandate to that effect from the electorate and negotiate frankly for independence in lieu of resorting to courses of patent illegality.

## 90. IRISH FREE STATE CLAIMS

*To the Editor of THE SCOTSMAN, 31 October 1932.*

In its memorandum of October 15 to the Irish Free State representatives the British Government has appealed to the recognized practice of nations to show that the agreements of 1923 and 1926 are binding on the Free State. This action raises a very grave difficulty. The demand for an inter-Imperial tribunal to deal with the present disputes has generally been supported on the score that our relations with

<sup>1</sup> See No. 82, *ante*.

the Free State are constitutional, not international, and that accordingly we must refuse to accept any foreign intervention in our arbitral tribunals. But, if our case is based on international law, the rationale of our refusal to accept an international tribunal, if not destroyed, is greatly weakened. It seems, indeed, very dubious whether it is worth while refusing to accept an ordinary international tribunal, if our arguments are to be based on international law.

On the other hand, if we base our claim on constitutional law, we encounter the very serious objection that it is an essential part of the constitutional law of the Dominions asserted by the Privy Council, the High Court of Australia, and the Supreme Court of Canada with gratifying unanimity,<sup>1</sup> that the promises of a Dominion Government are necessarily to be understood to be subject in matters of finance to approval by Parliament. It may be said that the agreement of 1923 was so confirmed by the Free State, though the point is arguable. But that of 1926 clearly was never permanently accepted by the Irish Free State Parliament. It is obvious that our negotiators made a very bad mistake when they failed in 1925 to effect a final financial settlement in treaty form duly approved by the British and Free State Parliaments, and I have no doubt that sooner or later we shall pay heavily for it in the inevitable waiver of part of our claims.

### 91. IRISH FREE STATE CLAIMS

*To the Editor of THE SCOTSMAN, 18 November 1932.*

In reply to 'Irishman's' inquiry in your issue of to-day, may I point out that the question is not one of the invalidity of the agreements of 1923 and 1926 between the United Kingdom and the Irish Free State? The agreements were unquestionably valid as governmental accords; they were duly executed by Mr. Cosgrave's Government, and no steps were taken to

<sup>1</sup> See Keith, *Constitutional Law of the British Dominions*, p. 387.

show that this action was in any sense illegal. *Prima facie*, they were just, perhaps even generous, settlements by the British Government of its claims upon the Free State.

The real issue is whether the mode of carrying out the agreements adopted by the parties was such as to convert them into obligations binding subsequent Governments and Parliaments in either country either (1) constitutionally or (2) internationally. I have already stated that I do not think that the agreement of 1926, which is the vital agreement, has been effectively made so binding under constitutional law, and I am strengthened in this opinion by the fact that the British Government has, inconsistently with its general attitude in these matters, appealed to international law as justifying its claim that the agreement binds the Free State. On this head much might be said *in abstracto*, but in my view the Permanent Court of International Justice, if the issue came before it, would be profoundly impressed by the fact that pecuniary relations between the United Kingdom and the Irish Free State were on three occasions, 1921, 1925, and 1929, deliberately regulated by formal instruments, which were duly submitted for the approval of the Parliaments in accordance with their express provisions. That these agreements bind every Government and Parliament of the Irish Free State is perfectly clear; if, therefore, an agreement of similar character is allowed to assume the form of a mere governmental accord, then it seems the legitimate conclusion that the parties to it deliberately refrained from taking the necessary step to bring it into the same condition as these permanent agreements. It may be that the British Government acted carelessly, or that Mr. Cosgrave was unwilling to apply to his Parliament for an Act, but I do not think that Mr. de Valera is under either international or constitutional law bound by the agreement of 1926. But his refusal to submit the issue to inter-Imperial arbitration suggests the doubt whether there may not be facts as yet undisclosed which render his legal advisers opposed to judicial settlement.

92. MR. DE VALERA AND THE  
GOVERNOR-GENERAL

*To the Editor of THE SCOTSMAN, 31 January 1933.*

There is one reform proposed by Mr. de Valera to which we may hope that the British Government will give ready assent, the abolition of the office of Governor-General. The Imperial Conference of 1930 placed it in the power of Mr. de Valera to remove one Governor-General and to appoint another, the King being helpless to intervene. The office has now been shorn of all ceremonial trappings, and is frankly useless, a mere burden on the revenues of the Free State. The Governor-General has neither power, prestige, nor influence, and this is a position which does discredit to the Crown.

It was arranged by the Government of Mr. Cosgrave that all essential issues of foreign affairs should be dealt with direct by the King himself. There is no reason why part of the functions performed by the Governor-General on its behalf should not be performed by His Majesty personally, thus emphasizing the position of the Free State as a distinct kingdom. Part, again, could be delegated by the King to the Chief Justice, or even to the President of the Council, who might, for instance, recommend money votes.<sup>1</sup> There is no substantial difficulty, merely a few details to arrange between His Majesty and his Government in the Free State. It would, therefore, be a serious blunder if this unimportant issue were not eliminated as a source of discord. Most people probably now realize that the Oath question in itself was never worth the amount of controversy which it excited.

## 93. THE DÁIL AND THE OATH OF ALLEGIANCE

*To the Editor of THE SCOTSMAN, 5 May 1933.*

It is satisfactory that Mr. Thomas has at last appreciated the fact that allegiance in the Irish Free State is in no way

<sup>1</sup> See No. 96, *post*.

connected with the oath provided for members in the Legislature by the Treaty of 1921. But, that being so, it is impossible not to ask why the British Government should have allowed Mr. de Valera to enjoy for so many months the tactical advantages of his Oath Bill instead of announcing its readiness to agree forthwith to the excision of the Oath by formal treaty alteration. British inaction was the less excusable because, by the Statute of Westminster, the Union of South Africa was given plenary power as regards the Oath under its Constitution, and such a right could not be denied, under the interpretation from the first placed on the Treaty, to the Free State. Moreover, far more important concessions, involving great pecuniary losses, were readily made to the Government of Mr. Cosgrave. Mr. de Valera, of course, would not have welcomed such an overture, but that is precisely one of the reasons why it should have been made, instead of leaving him with a popular basis of attack on the United Kingdom.

As it is, Mr. de Valera has secured far more than the abolition of the Oath. He has eliminated from the Constitution any restraint whatever; he has his nominee to assent to all his Bills, and a Supreme Court which can be counted upon to uphold any legislation, though strictly speaking it is clearly illegal. There is nothing now to prevent legislation to declare the abolition of the position of the Governor-General, and the elimination of the name of the Crown from the Constitution, including the formal disappearance of the appeal to the Privy Council. The only factors to render Mr. de Valera cautious are the prospect of further commercial restrictions, though British efforts in retaliation have not been so far a brilliant success, and the desire to secure the inclusion of Northern Ireland in the Republic. It seems unfortunate that neither Mr. de Valera nor the British Government appears capable of suggesting some new conventional arrangement under which the Free State might remain within the British Commonwealth, while enjoying in name the Republican Constitution which *de facto* she actually possesses.



## 94. THE CROWN AND THE IRISH FREE STATE

*To the Editor of THE SCOTSMAN, 10 August 1933.*

The new Bills promoted by Mr. de Valera carry into logical effect the decisions of the Imperial Conference of 1930. By converting the Governor-General into a nominee of the Government of the day, his purpose was destroyed, and his elimination from the Constitution became desirable. The appeal was successfully rendered worthless by Mr. Cosgrave's Government; to meet the views of that Government the Statute of Westminster was passed in such a form as to render it legal for the Free State to eliminate the appeal from the Constitution, and Mr. Cosgrave's Government had undertaken to carry out such elimination. Mr. Cosgrave's Government, of course, had already secured the virtual exclusion of the Governor-General and the Crown from any part even formal in the Executive Government.

There still remains the personal intervention of the King in the formal acts with regard to the accrediting of Irish Ministers to foreign Powers, and the signature and ratification of treaties. This contact with the Crown is, of course, of considerable international significance, and at present it can be avoided only by the Free State ceasing to become a party to treaties concluded in the names of heads of States and insisting on the form of treaties between Governments. It has not yet been made clear if the Free State proposes thus to act; even so, the question of accrediting Ministers would remain to necessitate Royal action.

As Mr. Cosgrave and Mr. de Valera are at one in their determination to eliminate the Crown as a real factor in government and no doubt represent the predominant view in the Free State, the question arises whether the British Government is to persist in the present attitude of hoping that something will turn up to render relations easier, or whether it ought not to attempt to recast relations with the Free State. Can any substantial ground be adduced for refusing to permit

the Free State the right to adopt by a plebiscite, if it so desires, a republican constitution, and to regulate relations with it by a treaty proper? If such a ground exists, why are we not informed of its nature instead of being left with the uncomfortable impression that we are contending for a shadow to the detriment of our economic interests no less than those of the Free State?

## 95. THE PRIVY COUNCIL AND THE IRISH FREE STATE

*To the Editor of THE SCOTSMAN, 10 October 1933.*

It is reported that the Privy Council has granted special leave to appeal from the decision of the Supreme Court of the Irish Free State in the matter of the fishing rights in the River Erne in Donegal. If this is so, the decision must be regarded as a most unfortunate exercise of the discretion of the Judicial Committee.

There is unanimity in the Irish Free State as represented by the late and the present Governments in desiring the abolition of the appeal. A Bill for that purpose has been introduced into the Dáil and has elicited no serious protest from any quarter. The appeal is not formally included in the Treaty of 1921. It has been held by the Privy Council that its existence is entailed by the rule that the Constitution of Canada is the model for Irish constitutional rights. But, accepting this view—which is not admitted in the Free State—the fact that under the Statute of Westminster, 1931, the Dominion of Canada can abolish the appeal can be adduced with much cogency to prove that the Irish Free State can abolish it without even a technical breach of the treaty.

The Bill is not yet law, and the legality of the Judicial Committee's action is clear. But the grant of leave in a case which does not touch the interests of minorities under the treaty and is concerned only with private rights, runs plainly counter to the principles on which leave to appeal from the Free State fell

to be granted, as formally announced by Lord Haldane in the leading case of *Hull v. M'Kenna*,<sup>1</sup> and to the doctrines formally accepted by the British Government at the Imperial Conferences of 1926 and 1930. No more unfortunate use of a discretionary authority can well be imagined, and it may be hoped that the Free State Parliament will lose no time in passing the necessary legislation to terminate this unhappy conflict.

## 96. BRITAIN AND THE IRISH FREE STATE

*To the Editor of THE SCOTSMAN, 15 November 1933.*

I fear that our Government, after swallowing a camel, is straining at a gnat in its fulmination against Mr. de Valera. Mr. Cosgrave was permitted without protest to eliminate the Crown from its proper connexion with (1) the Civil Service; (2) the armed forces; (3) the administration of justice; (4) stamps and coinage, and to ascribe to the Executive Council powers of every kind normally accorded to the Crown or its representative in Council. He was permitted to nullify the appeal to the Privy Council, and to compel the British Government to pay the sums which his Government under a Privy Council award should have paid. Mr. de Valera himself was permitted to insult His Majesty by compelling him to dismiss summarily a Governor-General whose one offence was that he resented gross disrespect by Ministers to the Crown, and to install as his successor a gentleman who refused to kiss hands on appointment, on condition that, in flat defiance of the Constitution, he accepted a bare fifth of his salary and occupied a suburban villa in lieu of the Viceregal Lodge, and that he acted in his capacity of 'Seneschal' as a mere instrument of Mr. de Valera's Government. Mr. de Valera was also permitted to remove the Oath from the Constitution in flat defiance of the actual treaty, and Mr. Thomas's admonition of May 4 was amazingly feeble.

<sup>1</sup> [1926] I.R. 402.

We are now asked to take seriously the two Acts and one Bill of the Irish Free State Parliament, and to accept Mr. Thomas's assurance that 'the legislation conflicts in important respects with the Treaty of 1921'. I agree with Mr. de Valera that 'the passing of these measures is in no way inconsistent with any legal or moral obligations of the Irish Free State', and I have no hesitation in holding that any Imperial or international tribunal would take that view. Before we are asked to make this a point of quarrel with the Free State, let us at least know the grounds of the governmental view, and, better still, let the Privy Council be asked for an opinion as an advisory judgement. The case to me seems overwhelmingly in favour of Mr. de Valera.

(1) Amendment No. 20 to transfer to the Executive Council from the Governor-General the formal recommendation of the purpose of the appropriation of money is a purely formal change which any Australian State or Newfoundland could make at will without any person having any objection.

(2) Amendment No. 21 omits from the Constitution the right of the Governor-General to withhold assent from or reserve Bills. This omission is clearly in accordance with the decisions of the Imperial Conference of 1930, and the British Government is clearly estopped from contesting the action now taken, unless it is prepared to repudiate the findings of that Conference and the terms of the Statute of Westminster.

(3) The elimination of the appeal to the Privy Council is the inevitable result of the Imperial Conference resolutions of 1926 and 1930, and of the Statute of Westminster. Since I wrote on this matter, Canada has acted and has cut off by law all appeals to the Privy Council on criminal matters, a term which includes those most important constitutional issues which arise under Provincial Acts imposing penalties for matters not properly criminal in the ordinary sense. As the Treaty of 1921 expressly places the Free State on the same footing as Canada, to deny the Free State legislative power now is, I fear, an attempt by the British Government to repudiate the

treaty. I have never pretended to think that the changes in Imperial relations of 1926-31 were wholly wise, agreeing in this with the statesmen of Australia and New Zealand and certain Canadian authorities, but what has been done cannot be undone, and this point seems now clearly within Irish power.

Finally, it seems to be a confession of bankruptcy of British statesmanship to deny the possibility of a formal Republican Constitution within so strange an edifice as the British Commonwealth of Nations. Rather should the effort be made to work out an effective system if, as I presume is the case, any importance is attached to maintaining close relations with the State. Otherwise why not concede independence, making it clear, of course, that Northern Ireland remains within the Commonwealth?<sup>1</sup>

## 97. BRITAIN AND THE IRISH FREE STATE

*To the Editor of THE SCOTSMAN, 17 November 1933.*

It is the Nemesis of a long letter that its last sentence only should be read. But the preceding sentences of my letter in your issue of the 16th inst. make it clear that what I urged was that we should not throw away the present chance of making a settlement with Mr. de Valera on the basis of the Free State enjoying a Republican Constitution within the Commonwealth, a settlement which it is clear would be welcomed by Mr. Cosgrave, Mr. MacDermot, and the vast body of Free State opinion. If there are any valid reasons against such a plan, why are they not adduced?

It cannot be too clearly understood that for all practical purposes the Free State enjoys the position of a Republic. Mr. Cosgrave eliminated the Crown from the internal government of the State so completely that nothing is left except a few

<sup>1</sup> This letter and Nos. 99 and 100, and a Memorandum of Dec. 30, 1933, on the Legal Aspects of the Anglo-Irish Dispute, were published in April 1934 by The Irish News and Information Bureau as a pamphlet.

formal functions in the Constitution which are performed by a Governor-General at the bidding of the President of the Council, His Majesty having no legal or moral right to give a single instruction to his representative. In external affairs, His Majesty must act absolutely on the advice of the Irish Free State, British Ministers being debarred from advice, and he cannot, if he wishes, refuse to accept the advice tendered, for he cannot dismiss the Ministry, and he cannot act without advice. The Free State claims, with the Union of South Africa, the right to remain neutral in British wars, and Mr. Cosgrave and Mr. MacDermot have united in declaring that the Free State has the right to determine whether or not to remain within the Commonwealth. The people of the Free State nominally owe allegiance to the Crown, but the Constitution itself denies to British subjects the privileges accorded to Irish citizens.

Under a Republican Constitution within the Commonwealth, formal allegiance would be replaced by interchange of rights of citizenship, the Crown would cease to be an object of hostility and derision, co-operation in foreign affairs on a treaty basis would replace the present chaotic relations, and, last not least, instead of treaty rights for coastal defence, which the best naval and military opinion considers would be a snare and delusion if the Irish Government and army were hostile, there would be arrangements for cordial and effective co-operation, precluding any return of the dismal days of 1916. We may regret that the Irish should demand a Republican Constitution, but, when we are prepared to take vast risks in India, it is fantastic to throw away a chance of settlement for mere words. Moreover, an offer to negotiate on this basis would prove at once whether Mr. de Valera is, as I believe, sincere in his offer, or is relying on the stupidity of his adversaries to decline to consider the project. He has apparently conceded that he must leave Northern Ireland to decide freely her own future.

The issue of the annuities, of course, could not be allowed

to block a settlement. Mr. Cosgrave and Mr. MacDermot have made it clear that they have no intention to pay them, and the Free State has already been excused its treaty obligations in respect of the British debt.

## 98. BRITAIN AND THE IRISH FREE STATE

MANCHESTER GUARDIAN, 6 December 1933.

The statement of Mr. Thomas on November 14 regarding Anglo-Irish relations has now led to a further grave error on the part of the British Government. That statement was wholly unjustified by the terms of the measures impugned, for Amendments 20-2 of the Free State Constitution afford neither moral nor legal ground for criticism. Mr. Thomas now refuses definitely to consider the suggestion that the Free State should be allowed to adhere to the Commonwealth on definite terms with power to assume a Republican Constitution and insists on the maintenance of the nominal sovereignty, already reduced to nullity by the Cosgrave Government.

It is undeniable that the Treaty of 1921 was forced on Ireland by a threat of war, and the Free State now has a moral right to its reconsideration. The flexibility of the Commonwealth Constitution should easily permit of Republican status with the recognition of the King as head of the Commonwealth, and it would be deplorable if the Free State were lost to the Commonwealth through lack of constructive thought and narrow legalism, as were the American colonies. There is urgent need of the generous statesmanship which secured the Transvaal's loyalty in 1914.

### FAILURE TO CONSULT THE DOMINIONS

The deliberate failure to consult the Dominions on vital issues deeply affecting them under the Statute of Westminster shows a deplorable lack of statesmanship and ignores their partnership in the Commonwealth.

The declaration of an Irish Republic would not justify

warlike measures in view of the Paris Pact. It would not affect the British nationality of Irish-born residents in the United Kingdom nor justify their removal from the civil or other services. The United Kingdom could bar the entry of the Irish as aliens, but could deport only those accepted by the Free State as citizens. The relations of the Free State with the Dominions would remain unaffected except in so far as the Dominions chose to act.

So far as the British case against the Irish Free State rests on the Amendments Nos. 20-2 of the Constitution it appears to have neither legal nor moral warrant. The transfer to the Executive Council of the formal recommendation of appropriations is not merely harmless, but there is a precedent in the Ceylon Constitution of 1931 drawn up by the Colonial Secretary which gives the like power to the Board of Ministers, not to the Governor, a fact which renders a British protest absurd.

The removal of the power to reserve Bills was deliberately discussed and agreed to at the Imperial Conference of 1929, whose report was adopted without hesitation by the Imperial Conference of 1930, and the way was made open for Irish action by the Statute of Westminster. The same Act authorized the Dominions to abolish the appeal to the Privy Council; Canada has under it abolished the appeal in all criminal cases, and the right of the Free State to abolish it is absolutely clear.

#### MR. COSGRAVE'S POLICY

Moreover, the intention of the Free State to use the powers to be given under the statute in the manner in question was made plain by Mr. Cosgrave's Government before the statute was passed, and the British Government, though warned of the result of passing the statute, persisted in doing so without safeguarding these issues. To denounce Mr. de Valera for carrying out the long-established policy of Mr. Cosgrave seems indefensible. The elimination of the Crown from the Constitution of the Free State was the deliberate purpose of Mr.



Cosgrave, who cut off all connexion between the Crown and the military forces, Civil Service, judiciary, even stamps and coinage, without eliciting British protests, and Mr. Thomas was party to the decision of the Imperial Conference of 1930 which made the Governor-General the servant of the Irish Government and enabled it to dismiss Mr. McNeill in 1932.

The accusation of breach of the Treaty of 1921 is indefensible unless it is alleged that the treaty stereotyped Irish powers to those then possessed by Canada, a view never hitherto alleged and contradictory to Mr. Lloyd George's contemporaneous view of its meaning. For the British Government to deny to the Free State a right given to and exercised by Canada is a clear breach of the treaty. Not less serious in its repercussion on other Dominions, especially the Union of South Africa, is the doctrine that the exercise of a right formally asserted by the Imperial Conferences of 1929 and 1930 can be regarded as an act inconsistent with membership of the British Commonwealth.

#### 99. THE IRISH FREE STATE AND THE CROWN

*To the Editor of THE SCOTSMAN, 6 December 1933.*

Mr. Thomas has evidently forgotten that Lord North and George III lost the British Empire in America by inability to surmount a rigid legalism and to apply constructive imagination to refashioning Imperial relations. He probably has never known that so republican were the Constitutions granted by Charles II to Connecticut and Rhode Island that these States preserved them unchanged on their entry into the Federation of the United States and only altered them in the nineteenth century.

(2) When Mr. Lloyd George rejected Mr. de Valera's offer of an Irish Republic within the Commonwealth in 1921, and enforced his rejection by threat of war, with the result of civil war in the Free State, he acted not for a name, but for the then existing reality of British control over the Dominions

in matters external and internal. But since then the British Government has parted with every vestige of authority over the Free State, and Mr. Lloyd George's grounds have ceased to have any validity.

(3) The King here has affectionate loyalty from his subjects, enormous influence, and, as 1931 should have reminded us, most important powers. In the Free State, Mr. Cosgrave, with the co-operation of successive British Governments, and most notably of Mr. Thomas, deprived the King of every vestige of influence and all legal power. There is not an act of external or internal affairs on which His Majesty can do otherwise than as bidden by the Executive Council of the State. He cannot refuse advice, he cannot dismiss a Ministry with a majority in the Dail. All his functions, now of the most limited kind in internal matters under the Constitution, are performed by a servant of the Ministry, who could not legally receive or obey an instruction from the King.

(4) Would it not be more honourable to terminate this farce of kingship in the Free State, and substitute for it a Constitution frankly republican but with genuine and cordial recognition of the King as the head of the Commonwealth, of which the Free State would accept freely membership? The alternative to refusal to consider such a possibility is to force Mr. de Valera to concentrate on the demand for complete independence. There was a time when political wisdom could have averted the loss of the American colonies by civil war. With that warning before us, are we to have nothing better than bare denials of the possibility of a Republic within the Commonwealth, unsupported by a shred of argument?

(5) Mr. Thomas alleges that 'the dispute between Ireland and ourselves does not affect the Dominions'. This is clearly contrary to the facts. Mr. Thomas has denied to the Free State the right to eliminate from the Constitution the power of the Governor-General to reserve Bills and the appeal to the Privy Council. General Hertzog has asserted that under the Statute of Westminster he possesses both these rights, and

Mr. Thomas's attitude must play directly into the hands of the Republicans in South Africa who have denied the reality of autonomy under the Statute. The Union also is deeply interested in Mr. Thomas's refusal to give Mr. de Valera an assurance that the United Kingdom would not regard as a cause of war a decision by the Irish people to sever their connexion with the Commonwealth.<sup>1</sup> This, of course, is a direct challenge to General Hertzog's assurance that the Imperial Conference recognized the right of secession, and must encourage republican agitation. Needless to say, in view of the League Covenant and the Paris Pact, any warlike action by the British Government is unthinkable, and if attempted would result in unanimous disapproval by the Dominions and the end of the Commonwealth.

(6) Mr. Thomas shows no anxiety for parliamentary discussion of an issue which demands its fullest attention. Is it forgotten<sup>2</sup> that it was Mr. Thomas who, acting on a most generous interpretation of the resolutions of the Imperial Conference, handed over to Mr. Cosgrave complete and unfettered control of all Irish foreign relations without communicating his intention to Parliament, and that, when later questioned, he contented himself by referring to Mr. Cosgrave's statements? If the House of Commons is not to discuss such issues, it serves no useful purpose. What is urgently needed is an effort by all parties in the country, with the aid of the Dominions, to work out a position which may preserve unity in essentials with the gratification of Irish aspirations, however needless we here may think them.

(7) Needless to say, the declaration of an Irish Republic would in no way affect the British nationality of Irish-born residents of the United Kingdom at the time of the declaration, nor would it debar such residents from the Civil Service. That could be done only by a British Act of Parliament, and it is absurd to suppose that such an Act would be passed

<sup>1</sup> Repeated by Lord Lucan, House of Lords, Dec. 20, 1934.

<sup>2</sup> See No. 79, *ante*.

against persons who desired to retain British nationality. Deportation would only be possible in cases where the Free State was willing to accept the deportees as citizens. A tariff war, of course, would be possible, but one already is being waged. The position of Irishmen in the Dominions would, moreover, depend wholly on the views taken by the Dominions of the quarrel. I fear that the Union at least would sympathize with the Free State rather than with us.

#### 100. THE IRISH FREE STATE AND THE APPEAL TO THE PRIVY COUNCIL

*To the Editor of THE SCOTSMAN, 7 December 1933.*

I presume that none of us desires to be unfair towards the Irish Free State, and I shall be glad if you will allow me to correct the grave errors on the subject of the appeal to the Privy Council committed by Lords Danesfort and Hailsham as reported in your issue of to-day.

(1) Prior to 1844 the prerogative right of appeal could be and was at times barred by local Acts in the colonies, and for that express reason the Judicial Committee Act of 1844 gave statutory power to admit appeals from any court whatever in the colonies.

(2) Notwithstanding this Act, the effect of which was overlooked in the Colonial Office as also in Canada, the Canadian Criminal Code provided for the extinction of the appeal in criminal cases. Many years later, in *Nadan v. R.* ([1926] A.C. 482), the Privy Council having had their attention called to the Act of 1844, ruled that Canada could not override the Act, and that also, as Canada had no extra-territorial power of legislation, the local Act might not be able to affect an action, i.e. the grant of leave, taking place in London.

(3) The decision was deeply resented in Canada, and, as the Union of South Africa and the Irish Free State concurred in these objections, the Statute of Westminster, 1931, by s. 2 gave full power to these Dominions to repeal in its application

to them the Act of 1844, and by s. 3 the right to give such repeal effect in London.

(4) On the strength of the Statute of Westminster, which is a solemn declaration of Dominion rights accepted by the whole Commonwealth, Canada has abolished the form of appeal which there is disliked, and the Irish Free State the whole appeal. To deny the validity of the Canadian Act will be a direct and fatal derogation from the Statute of Westminster, which will have grave repercussions in the Commonwealth.<sup>1</sup>

(5) There is not a word in the Treaty of 1921 regarding the appeal. As I pointed out at the time, this was a most grave omission, and raised the question whether it could be held to be implied. The Irish Free State denied that it was implicit, and it was only under British pressure that the Constitution contained a compromise solution, under which the Free State could by legislation prevent appeals being brought in all except constitutional cases. This, of course, was very different from the position in Canada, the model under the treaty for the Irish Free State, but the British Government was advised that it was sufficient to comply with the treaty.

(6) Mr. Cosgrave's Government never admitted that the treaty demanded the insertion of the appeal. It therefore nullified every appeal brought by private persons by legislation, and compelled the British Government to pay the extra compensation awarded to Civil Servants by the Privy Council, refusing absolutely to pay a penny. It co-operated with Canada in obtaining the clauses above mentioned in the Statute of Westminster, and it formally intimated that it was its deliberate intention when the Statute was passed to abolish wholly the appeal. Despite these facts, Mr. Thomas in his dispatch of December 5, wrote: 'The period which elapsed between 1921 and 1932 was marked by the progressive development of friendly relations and co-operation between the two coun-

<sup>1</sup> In the Judicial Committee, Dec. 4, 1934, it was stated that an appeal would arise where the validity of the Act of 1933 of Canada abolishing the appeal might be raised. Canadian feeling on the subject repudiates the possibility of the Act being invalid.

tries.' In the face of these words, how can the British Government honestly denounce Mr. de Valera for carrying out precisely the policy unswervingly followed by Mr. Cosgrave?

(7) For the reasons given above the passing of the Statute of Westminster rendered it a matter of indifference whether the appeal was implied in the treaty or not. The Privy Council in the musical copyright case ([1930] A.C. 377) incidentally held that it was, but unfortunately the case was not argued for the Free State, and the judgement therefore ignores essential arguments which seem not to have been presented to it. The Privy Council, of course, cannot disobey the Statute of Westminster, so that a final decision cannot now be obtained.

#### 101. MR. DE VALERA'S CLAIM OF THE RIGHT OF SECESSION

*To the Editor of THE SCOTSMAN, 26 July 1934.*

In Lord Hailsham's brilliant defence of the British refusal to admit Mr. de Valera's claim of the right of secession there is one vital weakness. He asserts that the Balfour Declaration of 1926 is conditioned by the terms of the Irish Treaty of 1921. This is a claim of the highest importance, but of very dubious validity, and it is certainly not one which Irish opinion can be expected to accept as valid. The argument against it can be put briefly as follows:

The Treaty of 1921 conferred on the Free State the status of Canada, and the Free State was assured contemporaneously that it would be entitled to receive any advantages which in future should accrue to Canada. The Declaration of 1926, therefore, must be regarded as paramount as an interpretation of Dominion status, and as according to the Free State powers, which may exceed those of the treaty. There is no saving of the treaty in the Declaration, no attempt to differentiate between the Free State and the other Dominions. If, therefore, the Declaration accords the right of secession to the Dominions, the Free State can claim that right.

This argument appears to be incapable of refutation, and the only point that arises is whether the Declaration does confer the right of secession. On this subject General Hertzog's view is categorical, and the Union Parliament has passed the Status of the Union Bill and the Royal Executive Functions and Seals Bill, which provide for the possibility of such secession by unilateral declaration. Lord Hailsham has naturally refused to commit himself to a denial that the Declaration confers on the Union the right of secession, for such a denial would raise a grave constitutional issue with the Union, and he must therefore affirm the superior validity of the treaty. Yet to do so is wholly unconvincing, for the Declaration has been recognized as the fundamental constitutional law of the Commonwealth by the Statute of Westminster, 1931, and by every Parliament in the Dominions. Moreover, the Government expressly refused to insert any saving in the Statute of the Irish Constitution and Treaty, and the Statute overrules any earlier legislation.

The promises of Lords Irwin and Willingdon that India shall have ultimately Dominion status render the constant evasion by the Government of the issue of secession as inherent in such status a matter of grave consequence. Surely it could declare frankly that it does not regard the Declaration as according such a right, if that is its view, and face the anger of General Hertzog; to evade difficulties does not normally solve them.

#### 102. THE IRISH FREE STATE CITIZENSHIP BILL

*To the Editor of THE SCOTSMAN, 29 November 1934.*

Mr. Thomas, I fear, reckons too lightly the effect of his own handiwork, the Statute of Westminster, 1931, when he assures us that the Citizenship Bill of the Irish Free State 'does not purport to, and could not, in any case, deprive any person of his status as a British subject'. He refers to the status as

existing within the State, as appears from the terms of the question to which he was replying, and his meaning clearly is that the Bill does not purport to eliminate from the internal law of the State the doctrine of British nationality, nor would it be effective if it were amended to purport to have such effect.

The first of these propositions seems certainly wrong. The Bill by clause 28 deliberately repeals the British Nationality and Status of Aliens Acts, 1914 and 1918, which in statute form contain the doctrine of British nationality. Mr. de Valera would deny that on their repeal the common law would revive, and it is probable that the Supreme Court, whence no appeal now lies to the Privy Council, would agree with him, and not with Mr. Thomas.

The second proposition is in part certainly wrong. Mr. Thomas has forgotten that the common law does not confer British nationality on numerous classes of persons, whose British nationality rests therefore solely on statute law. The repeal of that statute law, which is clearly valid under the Statute of Westminster, does deprive these persons of British nationality in the State, and this would be held by English as well as by Irish Courts. As regards the far wider category of persons, British subjects by common law, Mr. Thomas, I take it, asserts that the Free State by unilateral action cannot sever the connexion of allegiance between the Crown and persons born on Irish territory within Free State limits. This is to deny that the Free State can by unilateral action secede from the Commonwealth, a doctrine in which Mr. de Valera shares the views of General Hertzog. Here we clearly reach a position which passes beyond the control of the Courts, and on which the Irish and the English Courts, owing no common obedience to superior authority, might well differ *in toto*. Once more we see how unwise was the passing of the Statute of Westminster without achieving agreement on the submission to an inter-Imperial tribunal of all disputes between parts of the Commonwealth.



## 103. THE IRISH FREE STATE CITIZENSHIP BILL

*To the Editor of THE SCOTSMAN, 3 December 1934.*

Though Mr. Thomas, like an eminent predecessor in office, adheres to the spoken word,<sup>1</sup> it is clear that he has realized that his statement in the House of Commons was too absolute. In his speech at Derby he has implicitly jettisoned the untenable doctrine that persons whose British nationality rests only on statute of the Parliament of the United Kingdom remain within the Irish Free State such nationals, if the Irish Parliament under the powers conceded by the Statute of Westminster repeals for the Free State the statutes giving them British nationality. To persist in such a doctrine would be to assert that the Statute of Westminster was an idle farce.

Mr. Thomas, therefore, by abandoning this claim of superiority for the United Kingdom, which, persisted in, would embroil him with the other Dominions, reduces the British position to much more tenable form. He now recognizes that Mr. de Valera's Bill does purport to deprive many people of their status as British subjects, though in the Commons he denied this, and his proposition now is that the tie of allegiance constituted by birth on British territory is such that it cannot be extinguished by any Dominion legislature, even with the Royal assent, the control of which he himself handed over to Mr. de Valera. I presume that Mr. Thomas would contend that the bond of allegiance could be broken only by the concurrent action of the United Kingdom and the Dominions, or at least by the action of the United Kingdom and the Free State.

Now this is clearly a legal question, and the value of any opinion on it depends entirely on the degree in which it approaches the view which the law courts would take. That compels us to examine the attitude of the Courts in general, and it requires no special powers of prediction to hold it prob-

<sup>1</sup> Mr. Thomas on Dec. 1, 1934, reiterated his assertion criticized in No. 102. See No. 85, *ante*.

able that the Supreme Court of the Irish Free State would hold that it was within the powers of the Irish Parliament to extinguish in Irish law the existence of such a bond, and candour compels the admission that on strict legal reasoning a most powerful case can be made out for this view. What English Courts would hold is far less easy to predict. But the essential fact is that the Irish Courts are on a footing of equality with the English as exponents of law, and, thanks to the lack of statesmanship and prescience on the part of Mr. Thomas and his colleagues, the Statute of Westminster was passed without any provision being made for the effective determination by an inter-Imperial tribunal of disputes such as this. Nor should it be forgotten that the Union of South Africa seems bent on getting rid of the idea of British nationality.

#### 104. THE IRISH FREE STATE CITIZENSHIP BILL

*To the Editor of THE SCOTSMAN, 10 December 1934.*

Mr. de Valera has very properly profited by Mr. Thomas's criticisms to make perfectly explicit the meaning of his Citizenship Bill. He has taken the precaution to negative any possible revival of the common law in consequence of the repeal of the British Nationality and Status of Aliens Acts, 1914 and 1918, and he has made it plain that in the Irish Free State citizens shall not be reckoned as being British nationals or subjects. I have no doubt that, if his Bill as proposed to be amended is passed, the Irish Courts will be bound to hold and will hold that under Irish law the citizen of the State is not a British subject.

The minority in the Free State which desires to remain in possession of British nationality is placed in an unfortunate position, and may well resent the light-hearted action of the Government which passed the Statute of Westminster, 1931, without appreciation of the meaning of their own handiwork. But they have two courses open to them: (1) They may decide to remain Irish citizens in the Free State, content with the

fact that in the rest of the King's dominions they remain British subjects<sup>1</sup> and nationals, and will be recognized as such, and that they will be entitled in foreign countries to be treated as British subjects. It is true that Mr. de Valera intends to provide that a citizen of the Free State shall be such for all international purposes. Outside the Free State, however, the enactment comes into competition with the rules of law made by the Imperial Parliament, and it is extremely unlikely that any foreign Power, free to make a decision, would refuse to recognize a British claim that British protection could be extended to a British subject, despite the fact that he was also an Irish Free State citizen, if that subject claimed that protection. (2) They may take advantage of the power to rid themselves of Irish citizenship on attaining age 21 which the Bill recognizes. That, however, involves the loss of the franchise and other advantages, and on consideration the first course may well commend itself to the minority.

The whole trouble is due to the virtual surrender of insistence on British nationality by the Imperial Conference of 1930 and its homologation in the Statute of Westminster, 1931. Mr. de Valera has the precedent of the action of Generals Hertzog and Smuts, who, with the overwhelming support of their followers, have asserted that nationality is not British but South African, and that common status does not mean common nationality. With the spectacle of British approval of the Union action, Mr. de Valera may well wonder why so much bitterness is shown at his declaration that Irish citizens are not British nationals. The time may come when our politicians will realize that, when they substituted a common status based on allegiance for a common nationality, they destroyed the effectiveness of the essential link of Empire. Consciousness of a common nationality, not subjection to a single head, is the only basis on which a Commonwealth can endure.

<sup>1</sup> Lord Danesfort's view to the contrary (House of Lords, Dec. 20 1934) is based on an error of law. The Bill as amended on report was renamed The Irish Nationality and Citizenship Bill, 1934.

## 105. THE IRISH FREE STATE CITIZENSHIP BILL

*To the Editor of THE SCOTSMAN, 11 December 1934.*

It will be found on reference to p. 64 of my *Constitutional Law of the British Dominions*, which you do me the honour to quote in your leader to-day, that my statement as to the Dominion view on common status is preceded by an exposition of the views of the Irish Free State Government on the subject. My statement naturally was intended to be read subject to the immediately preceding paragraph, and to refer to the attitude of those Dominions which, as is well known, accept loyally the Commonwealth ideal—Canada, Australia, New Zealand, and Newfoundland. These Dominions differ vitally from the Union of South Africa and the Irish Free State in that they do not claim the right of secession.

(2) It will further be found from pp. 63-4 of my work that in 1931 the Free State Minister responsible in the matter enunciated a view of the effect of the Statute of Westminster on the issue of Irish nationality which, in the essential points, is the precursor of the legislation proposed by Mr. de Valera. It cannot be too clearly recognized that in this matter, as in the abolition of the appeal to the Privy Council, Mr. de Valera is following, not merely in substance, but in detail, in the footsteps of Mr. Cosgrave's Government, a Government with which Mr. Thomas was on cordial terms. There is nothing on public record to show that Mr. Thomas ever took exception to Mr. M'Gilligan's views. As Mr. de Valera has admitted, little in the way of destroying the connexion of the Free State with the British Commonwealth was left for him to do by his predecessor, who arrogated to himself the right to appoint the Governor-General, and took out of British hands all control over Irish foreign relations. When the fact of this vital surrender, in which Mr. Thomas concurred, is borne in mind, it is a little difficult to take tragically legislation, whose practical effect, as I have shown in my letter in your issue of to-day, is probably negligible.

(3) Even were Mr. de Valera not treading in the footsteps of Mr. Cosgrave, it must be remembered that resolutions of the Imperial Conference do not bind a Government not party to them. This was laid down definitely by Mr. R. MacDonald in 1924 when he refused to give effect to Mr. Baldwin's undertakings in 1923, but it has always been part of the Constitution of the Empire.<sup>1</sup> Mr. de Valera has never pretended at any time that he acquiesces in the Constitution of the Commonwealth as it stands, and he has the clear approval of the electorate for his action.

(4) When I wrote in 1932 (not 1933 as you state) I could not criticize Mr. Thomas for sacrificing the bond of British nationality for the sufficient reason that there existed no published evidence on which I could base that criticism, though suspicion existed. All doubt was dispelled this year when the Union of South Africa adopted in set terms the doctrine that there was no bond of British nationality, and that the common status was not nationality, and no protest was made by the British Government. This is conclusive confirmation of the position adopted in 1931 by Mr. M'Gilligan, and shows that in 1930 the British Government included in its surrender at discretion to the demands of the Union and the Irish Free State the principle of British nationality. Surely it is not unreasonable to criticize politicians who made so vital a surrender and who were meticulously careful to conceal from the British public the fact that they had done so, and surely it is not belated to make the criticism on the first occasion when it is relevant and proof to substantiate it exists.

(5) In view of the surrender in 1930 it seems to me to be stressing trivialities and to be playing into Mr. de Valera's hands to insist on criticism of his Bill. Will such action further the interests of the minority in the Free State? The answer seems clearly in the negative, and there is assuredly sufficient ill-will already between Britain and the State to deter even politicians from augmenting it by contentions over legal niceties.

<sup>1</sup> See Nos. 30 and 31, *ante*.

## 106. THE OATH OF ALLEGIANCE

*To the Editor of THE SCOTSMAN, 20 December 1934.*

May I point out that the decision of the majority of the Supreme Court as to the validity of the Constitution (Amendment No. 17) Act of the Irish Free State, and of the tribunals established under it, in no wise covers the case of the validity of the Act abolishing the oath to the King? The former Act could be declared invalid only on the Chief Justice's theory that the Act of 1929, extending to sixteen years the period within which constitutional changes could be made by simple Act without a referendum, was itself invalid. But that the Chief Justice was wrong on this head can hardly be denied. Article 50 of the Constitution, which gave the power for eight years to effect changes by simple Act, did not prevent alteration of that Article itself, and, when the Constitution was enacted, it was part of the constitutional law of the Empire that a power of change granted by a Constitution applies to authorize change of the power itself, unless it is safeguarded, as it normally is, by forbidding change of the section giving the power. The omission of this precaution in the Free State Constitution must have been intentional, and therefore it was natural that the Dáil, at Mr. Cosgrave's suggestion, and with the full approval of Mr. de Valera, then in opposition, should extend the period for change without a referendum.

The Act abolishing the Oath is in quite a different position. It not merely abolishes the Oath which is part of the treaty, but in order to do so it abolishes the provision in the Act of the Constituent Assembly of 1922 which makes the Constitution subject to the Treaty of 1921. I cannot conceive of any reasoning which in law would justify the attempt of the Dail to override the fundamental limitations put on its constituent power by the authority which created it. I have no doubt that the British Government shares this view, but I cannot imagine that it holds that the Act of 1929 was invalid, nor has it any interest in so holding.

## 107. SOUTH AFRICA AND THE EMPIRE

*To the Editor of THE SCOTSMAN, 16 March 1934.*

It seems paradoxical to claim that the tie between the Union and the Empire is strengthened rather than weakened by the measures to be passed by the Union Parliament, or that they will consolidate the constitutional position of the Crown in regard to South Africa. The real effect of the proposals may, I think, rather be summed up as follows:

(1) Their primary purpose is to secure that every function of the Crown in respect of the Union shall be exercised, whether by the Crown personally or by the Governor-General, solely on the advice of the Union Ministry, and that the Crown or its representative shall be under legal obligation to act on that advice. In particular, the Crown will have no voice (except by courtesy) in the appointment of the Governor-General, nor in his removal, and will have no power to give him any instructions save such as are desired by the Union Government.

(2) The Constitution of the Union will thus be assimilated to that of the Irish Free State, and be differentiated from that of the United Kingdom. In this country the Crown retains powers which can and doubtless would be used to prevent unconstitutional action by a Ministry or Parliament; for instance, the continuation in office of a defeated Ministry, or the prolongation of the life of a Parliament beyond the normal period if it had ceased to represent the will of the electorate. In the Union, as in the Free State, the Ministry and the Parliament now are exempt from any form of legal control.

(3) From the point of view of the supporters of secession and neutrality the measures have distinct value. General Hertzog's ideal was the right of the Union Parliament, by a simple majority in either House, to declare the termination of the connexion of the Union with the Empire. General Smuts used to deny that the Governor-General could assent to such a Bill, and, so long as he was not selected by and subject

to removal by the Union Government, it was at least probable that he would refuse assent. We have seen in the Free State the removal of a Governor-General in order to assure that assent should be given to a Bill violating the Constitution,<sup>1</sup> and any Ministry which desired to secure an Act of Secession would simply place in the office of Governor-General one of its supporters, and then could enact a measure which no Court could impugn. Similarly, it will now be clear that His Majesty will be unable to declare war for the Union except on the advice of the Union Government, and must declare neutrality if it so advises.

(4) There is only one point of substance in the matter, for all that is being done is the inevitable, if perhaps unrealized, outcome of the Conference of 1926 and the Statute of Westminster. Is the right of disallowance still permitted to the Crown on the advice of the Secretary of State in the event of a measure being passed which infringes the conditions under which Union stocks have been admitted to trustee rank? The Conferences of 1929 and 1930 agreed that the right must remain in such a case, as to remove it would be a breach of faith. It would, no doubt, be much better to substitute another form of control, but, unless that is offered, it is clearly improper that the right should be taken away, though the legal power to do so is beyond question.<sup>2</sup>

## 108. THE SOUTH AFRICAN CONSTITUTIONAL BILLS

*To the Editor of NATAL MERCURY, 16 April 1934.*

It is impossible to accept General Smuts's contention that the assertion of Sovereign Independence by the Union is in accord with the definition of Dominion Status by the Imperial Conference of 1926. That Conference with great care avoided anything derogating from the essential international unity of the Commonwealth and stressed this unity by styling the

<sup>1</sup> See Nos. 88 and 89, *ante*.

<sup>2</sup> See Nos. 116 and 117, *post*.



United Kingdom and the Dominions as 'autonomous communities within the British Empire' and by insisting that equality of status was conjoined with diversity of function. Lord Balfour in his exposition of his work claimed that he had established the basis of the maintenance of that unity.

On the other hand, the Declaration of 1926 is not sacrosanct, and by stressing the negative aspect of autonomy it is easy to arrive at a claim for Sovereign Independence, but it is indefensible to ascribe to the Conference of 1926 the responsibility for a one-sided development which certainly was never contemplated by the majority of the members of the Conference.

For practical purposes by far the most important issue is the destruction of any safeguard for the maintenance of the Constitutional Government by taking away all check on the powers of the Ministry which has the support of Parliament for the time being. The King's personal intervention can be dispensed with under the Royal Executive Functions measure, and the Governor-General if, as would doubtless be the case, he was the Ministry's nominee would interpose no control of any kind.

The Ministry could then (1) sweep away the Cape Franchise which under the Status measure ceases to be effectively safeguarded in any way; (2) abolish the Provinces;<sup>1</sup> (3) extend the duration of Parliament, thus depriving the electorate of the power of control of its representatives; and (4) declare the secession of the Union from the Empire.

No such unfettered authority exists in any other part of the Commonwealth and the new Constitution thus differs essentially from the British Constitution. It may be that the absence of a strong partisan feeling and the conservatism of the people render so remarkable an experiment innocuous in the Union.

It appears, indeed, to be proposed to give the Governor-General the right to dismiss Ministers, but such a right would

<sup>1</sup> This difficulty led to the passing of the South Africa Act Amendment Act, 1934, which declares that no province shall be abolished, have its powers abridged, or its boundaries altered save on the petition of the Provincial Council. But it was admitted by the Ministry that the Act has no binding power, as the Constitution is now without safeguards.

be meaningless as a safeguard, since Mr. de Valera in the Irish Free State established in 1932 the right of the Ministry to remove from office the Governor-General as a preliminary to the passing of unconstitutional legislation. It will now be open for the Governor-General to exercise at the discretion of the Ministry all sovereign powers, including the declaration of war, peace, or neutrality and the making of treaties. This, of course, is a fundamental change, for external sovereign action has hitherto in the Dominions been taken by the King on Dominion advice.

It appears to me, as I have often pointed out, that a change is desirable. If neutrality is to be proclaimed in a British war or a treaty inimical to British interests is to be made it ought not to be done by the King personally, for such action would lead to misunderstanding and might endanger the loyalty of the people of the United Kingdom to their Sovereign. No doubt the Imperial Defence Committee will take due consideration of possible Union neutrality in future plans for the defence of the Empire.

The possibility of secession will compel reconsideration of the question of the transfer of the Protectorates and Basutoland to the Union. It involves a vital change in circumstances that prevailed when the possibility of transfer was mooted. Moreover, the abolition of any authority on the part of the King over the Union in itself is inconsistent with the schedule to the South Africa Act.

Insistence on Union Nationality as opposed to British Nationality no doubt will accelerate the tendency of foreign countries to refuse to accord to nationals of the Dominions which do not accept British treaties rights stipulated for British subjects in general.

But the claim of Dominions which stand apart from British treaties to secure for their nationals rights accorded to British subjects has always been anomalous, and I have never believed that it could have been enforced at international law if foreign countries had disputed it.

It is useless to answer the abstract question whether an Act of the Imperial Parliament could now be passed to bind the Union in spite of the new measures, as it is certain that no such Act would ever be passed.

It is most satisfactory to note that, while the new legislation technically facilitates secession, the re-enactment as a Union Act of the Statute of Westminster, whatever its legal value, including provision as to succession to the Throne, affords the reassurance that in the eyes of the Ministry a vital difference exists between the right to secede and the exercise of that right. If, despite the dangers involved in an uncontrolled Constitution, the new measures bring satisfaction to the national sentiment of the Union, they will undoubtedly deserve to rank as a landmark in the evolution of the Commonwealth, especially if all the people in the Union now feel at liberty to promote—in their sovereign independence—co-operation in the Commonwealth.

#### 109. SOUTH AFRICA'S PROPOSED CONSTITUTION

*To the Editor of THE MORNING POST, 11 April 1934.*

As few of your readers will probably have before them the text of the important South African Bills, it may be worth while to call attention to one or two salient features which seem hardly sufficiently to have been brought out in the cabled summaries.

(1) The essential innovation is the taking of power to eliminate the personal action of the Crown in respect of external affairs. Hitherto in the Dominions, while all action in external no less than in internal matters has been taken on the advice of the Dominion Government, there has been the marked distinction between these spheres in that in external issues the personal action of the Crown has been required, and the King has acted in treaty making, and would, of course, act in issues of neutrality or war and peace. The Royal Executive Functions and Seals Bill still permits the King to act, but, at the

discretion of the Union Ministry, enables it to substitute action by the Governor-General, if, for instance, His Majesty declined to declare neutrality in a British war or war against an ally of the British Crown. It may fairly be said that this procedure is desirable, for the King ought not personally to be placed in a position in which his action might raise resentment here. But it is a revolutionary change.

#### UNFETTERED POWER

(2) As the Bills stand, the Union Constitution loses all checks on the power of the Ministry in office at any moment, and thus departs vitally from the model of the Constitution of the United Kingdom. The Governor-General is the nominee of the Ministry, and with his concurrence the Parliament can legally extend its existence at pleasure, declare the Union a republic, or sweep away the Cape native franchise. Should a Governor-General be recalcitrant, the precedent of the Governor-General of the Irish Free State is conclusive of his fate. I do not doubt that the Union Parliament will act wisely, but it is right to note this enormous concession of unfettered power to what may be a chance majority secured in a moment of public excitement. The Irish Free State at least has the safeguard of proportional representation to control the composition of the Dáil.

(3) As the legal assertion of sovereign independence is now taking place, it will be necessary to reconsider the position of the Protectorates and Basutoland. The proposal to hand them over to the Union was contemplated when the South Africa Act, 1909, was passed, because the Union was intended to remain an integral part of the Empire. It would clearly now be impossible to transfer these territories without their full assent, and that of the British Parliament, to an independent kingdom whose connexion with the Crown of the United Kingdom could in law be severed by a simple Act passed by a bare majority in either House.

The South African action can unquestionably be regarded

as a legitimate, though not the necessary, outcome of the Conference of 1926, and no one will desire to criticize the decision taken. But I think it well to realize how complete the change of status is. It appears, indeed, that the Union Government is prepared to adopt the view that the Governor-General should be given the discretionary power to dismiss a Ministry as a measure of safeguard for the rights of the electorate as against their spokesmen in Parliament, but this is clearly useless in view of the certainty that any Ministry would take the precaution, as did Mr. de Valera, to secure that the office was in trustworthy hands.

#### 110. FUNDAMENTAL ALTERATIONS OF SOUTH AFRICAN LAW

*To the Editor, CAPE TIMES, 18 July 1934.*

In your issue of June 28 you criticize a letter of mine to Mr. Marwick, which appears to have been deemed by the latter worthy of publication, on the ground that it does not give my views on the relation of the Status of the Union Bill to pre-existing constitutional practice and the Statute of Westminster. I must remind you that as early as April 16 the Natal Mercury, and I understand certain other papers, published a full statement of my views obtained by your representative in London, and that it would have therefore been absurd to repeat them in my letter to Mr. Marwick.

The essential point which I made was that the new Constitution confers on the Ministry of the day complete control over the representative of the Crown, and authorizes the latter on advice of Ministers to exercise even in external affairs the prerogatives of the Crown. It results, therefore, that under the new Constitution the Ministry might secure a declaration of neutrality by the Governor-General for the Union without any action on the part of the King, and it might secure his assent to an Act to eliminate the Crown from the Constitution, again without the King's consent. These matters constitute

the carrying out in legal form of the principles of the right of secession and of neutrality asserted by General Hertzog, but apparently denied by General Smuts, and thus in my opinion the new measure, instead of leaving unaltered the status quo as regards the Constitution, definitely solves the former doubts in favour of General Hertzog's views.

I note with satisfaction that Professor J. H. Morgan has altered the extreme views which he rather hastily expressed on the appearance of the Bill, but neither he nor Sir Lynden Macassey deals with the points raised by me. I note that in the parliamentary debates the Government studiously refrained from any endeavour to refute them, and it still appears to me that to pass legislation without a definite understanding of its meaning, when such vital questions as those of neutrality and secession are concerned, was deeply regrettable. Nor does it make the matter any better that in the British Parliament also during the discussion of the Statute of Westminster, 1931, the same issues were burked, and it is pertinent to remember that several confident assertions by governmental spokesmen on that occasion were promptly shown to be illusions by the action of the Irish Free State. The public is entitled to know exactly what Parliament enacts, and ambiguity is not normally deemed a merit in legislation.

### III. FUNDAMENTAL ALTERATIONS OF SOUTH AFRICAN LAW

*To the Editor, CAPE TIMES, 5 September 1934.*

In commenting on the views expressed in my letter of July 18 in your issue of August 8, you assert that my view is completely in conflict with that of Professor J. H. Morgan, Sir Lynden Macassey, and others. I have to point out that, so far as I am aware, neither of these authorities has attempted to deal with my arguments as to the effect of the Union legislation of 1934, and that, if these arguments can be refuted, it is eminently desirable that some effort to do so should be made.

But, assuming that my arguments are capable of refutation, then two results follow. (1) It is impossible to regard the Status Act as a 'vital landmark' in the history of the Commonwealth, for it carries matters no farther than the Statute of Westminster, 1931, and must be regarded as merely implementing for the Union that essential statute. (2) It is clear that General Hertzog has failed to implement the categorical and emphatic assurances which he gave in February to Mr. Erasmus, that he would legislate to bring South Africa's position into full accord with its sovereign independent status, as defined by General Hertzog and the Head Committee. Personally I cannot for a moment believe that General Hertzog has broken his pledged word, and I recognize in his legislation a vital landmark because it for the first time provides a legal basis for (1) the divisibility of the Crown; (2) the right of separation; and (3) the right of neutrality. To me, as General Hertzog and to Colonel Stallard and his friends, these matters appear far more than legalistic quibbles. They are the essence of sovereign independence, and their assertion marks the culmination of General Hertzog's most essential work.

## 112. THE 'NEUTRALITY' OF SOUTH AFRICA

*To the Editor of THE MORNING POST, 18 October 1934.*

I note that General Hertzog has again committed himself to the doctrine that the Union of South Africa may remain neutral in a war declared by the King on the advice of the British Government, and has at last<sup>1</sup> faced the issue of the position of the British naval base at Simonstown. His contention regarding the latter is that in the event of a British war the Union would stand in the same position to Simonstown as does Spain to Gibraltar.

I fear that this assertion is patently untenable. In 1921,

<sup>1</sup> See Keith, *The Sovereignty of the British Dominions*, p. 469, where his earlier failure to envisage the situation is shown.

when a transfer of certain lands and buildings was made to the Union, the Admiralty was assured of the right of the perpetual user for naval purposes of the lands and buildings then occupied for these ends. Further, the Union Government undertook responsibility for the defence of the naval dockyard at Simonstown as a base and naval fuelling station for the British Navy, and to keep them in a state of defence for Imperial purposes, so that the station would be able to discharge its function in the scheme of Imperial defence.

Unless General Hertzog proposes to repudiate this obligation—which is most improbable—he cannot claim effectively in International Law, as it now stands, that an enemy of the King should respect Union neutrality. The case is closely analogous to that of the Irish Free State, where Mr. de Valera has quite correctly insisted that the obligations as to facilities for naval defence imposed by the Treaty of 1921 negate the possibility of true neutrality for the Irish Free State.

The analogy of Spain, of course, is worthless: Spain is under no obligation to defend Gibraltar, and the Union is still united to the United Kingdom by the bond of common allegiance.

### 113. GENERAL SMUTS AND SOUTH AFRICA

*To the Editor of THE SCOTSMAN, 20 October 1934.*

Political memories are notoriously short, but it is really amazing to find General Smuts under the impression that self-government in South Africa was the gift of the United Kingdom as a whole. In point of fact, it was conceded to the conquered colonies by the Liberal party in the teeth of bitter opposition of the Conservatives and Unionists, and the grant would never have been made in 1906–7 but for the fact that it was found that it was possible to establish responsible government in the two colonies by the Royal prerogative. No one can seriously suppose that an Act for this purpose could ever have been passed through the House of Lords.

General Smuts, again, in painting for us the picture of a



South Africa wholeheartedly co-operating with the rest of the Commonwealth, forgets to remind us that the latest measure of the Union Parliament is, as explained by the Prime Minister of the Union, intended to assert the essential doctrines of (1) the divisibility of the Crown; (2) the right of secession; and (3) the right of neutrality. The Prime Minister has also made it clear that there is no understanding of any sort with the British Government that the Union will co-operate in a British war, and he has pointed out that in the event of the Union declaring neutrality in such a war its position as regards the United Kingdom will be analogous to that of Spain. Those who, while most anxious to further political reforms in India, suggest caution and deprecate placing India at any early date in the position of the Union are hardly deserving of the censure of placing party above principle.

#### 114. SOUTH AFRICA AND THE EMPIRE

*To the Editor of THE SCOTSMAN, 24 October 1934.*

British faith and statesmanship unquestionably saved the Union to the Empire in the Great War. But the view that Afrikaans-speaking South Africa really accepts the Empire is open to grave doubt. If it does, why does it assert the doctrines of divisibility of the Crown, of secession, and of neutrality? Why does it demand the abolition or weakening of the rule that Union citizens are British subjects? Why, again, does the constitution of the fusion party provide for the right of its members to work within the party for the declaration of a Republic? Why does General Hertzog assure the supporters of the party in the Backveld (1) that South Africa has the right to sell goods to any nation with whom Great Britain is at war, and (2) that South Africa is so free and independent that she could select the King of the Belgians as her king?

The truth is that British faith and statesmanship have to contend against a deep-rooted love of Republicanism, and the ultimate result no man can foretell. The South Africa precedent was adduced to justify the Irish experiment. Yet

Mr. Cosgrave left Mr. de Valera nothing of consequence to do as regards the elimination of the Crown from connexion with the government of the Free State. In this case again faith has failed to alter obstacles based on centuries of history. Faith has solved neither the problem of South Africa nor that of the Irish Free State, and Indian policy must be decided with due recognition of the fundamental differences between India and the Union or the Free State and of the fact that concession of authority on the lines of the White Paper would be irrevocable.

To prevent misunderstanding it is desirable to point out the fundamental distinction as regards a British war between Canada and Australia and the Union. The former Dominions have no legal power to declare neutrality or secession; their Prime Ministers have never claimed any such right; Canadians and Australians still accept the status of British subjects. If Britain is at war, they are at war also *ipso facto*. In the case of the Union, on the outbreak of war Britain may be confronted with a declaration of neutrality, which might prove most damaging to British schemes of naval operations, for, if the Union is declared neutral, the British Fleet cannot use Simonstown as a base without violation of that neutrality, a fact which General Hertzog unfortunately has failed to realize.

#### 115. SOUTH AFRICA AND THE NATIVE TERRITORIES

*To the Editor of THE MORNING POST, 28 April 1934.*

In the controversy which has arisen in the Union of South Africa on the legal aspect of the transfer of the native territories to the Union no reference appears to have been made to the vital question of the effect of Clause 7 of the Royal Executive Functions and Seals Bill. Under that clause the authority of the King in Council under the South Africa Act, 1909, is to be transferred to the Governor-General in Council, unless the latter decides that the exigencies of the case require that action should be by the King in Council.

It is obviously very unsatisfactory that there should be no express saving of the provision for action by the King in Council only in regard to transfer of the native territories. It would be impossible for the British Government to admit that they could be transferred by order of the Governor-General in Council, either legally or constitutionally, and the Bill should be amended to secure the position.

It has been suggested that the Union Parliament would be willing to enact as Union law the restrictions on government contained in the schedule to the South Africa Act. The difficulty is that, as the Union Parliament is of full sovereign capacity, such enactment could at any time be cancelled, for, even if power to disallow any Union Act altering the conditions were given, no British Government would dare to act on that power. It seems, therefore, inevitable that the transfer of the territories must wait until the Union Government can persuade the native communities that their interests will be safe under Union control.

#### 116. SOUTH AFRICA AND THE COLONIAL STOCK BILL

*To the Editor of THE TIMES, 5 July 1934.*

May I suggest that the Governments of this country and of the Union of South Africa in their agreement regarding safeguards for holders of Union trustee stocks have neglected an excellent opportunity of applying the principle of inter-Imperial judicial settlement of disputes?

Hitherto the British Government has possessed a discretionary right recognized by the Imperial Conference of 1930 to disallow Union legislation which it considers injurious to stockholders or to involve a departure from the original contract. In lieu it has accepted the obligation of the Union Government to 'take the necessary steps to ensure such amendment as may be requested' by the British Government in such legislation.

Imagine the position of the Union Government when it brings down to Parliament a Bill to carry out a request by the British Government of which it does not approve. Parliament can hardly be expected to accept such a proposal on British authority. The obvious course is to provide for reference to an inter-Imperial tribunal of such a dispute, both sides agreeing to accept its decision; for the Union Parliament would doubtless honour an obligation thus affirmed where it would decline the mere request of the British Government. As it stands the new agreement replaces disallowance by a procedure which if brought into action would probably involve a bitter inter-Imperial conflict, so that the British Government in practice would decline to take action.

#### 117. THE COLONIAL STOCK BILL AND AN INTER-IMPERIAL TRIBUNAL

*To the Editor of THE SCOTSMAN, 17 July 1934.*

It is natural that the Government of the Union of South Africa should have proposed the form of undertaking in respect of Union trustee stocks now adopted in the Colonial Stock Bill. In lieu of the undoubted power of disallowance of Union measures, reaffirmed by the Imperial Conference of 1930 as still proper to be employed if the Union should pass legislation unjust to investors, has been substituted a mere undertaking by the Union Government to secure the amendment by the Union Parliament of any such legislation at the request of the British Government. It is obvious that a Union Parliament would be most unwilling to alter an Act originally passed at the invitation of a Union Government, because of any British request. The Nationalist spirit would be deeply offended by any such action, and the British Government, unwilling to raise an issue of first-class importance, would, doubtless, prefer to acquiesce in injustice to investors.

It is perfectly true that disallowance is an unsatisfactory mode in which to deal with such an issue, but the substitute

is no better. The real safeguard for investors is the right to invoke the jurisdiction of an inter-Imperial Court, for it is clear that a Dominion Parliament can accept the decision of such a Court where it could not yield to British authority. Similarly, the British Government would be in a far stronger position if, when injustice is alleged, it had the right to refer the issue to an impartial Court. It is incompatible with the present state of inter-Imperial relations that the British Government should be assigned the right to determine at its discretion that a Dominion Parliament had acted unjustly.<sup>1</sup>

Mr. Chamberlain's argument against a permanent inter-Imperial tribunal is unconvincing. His suggestion that the question of the Irish land annuities could not be solved by a tribunal is wholly unsatisfactory. It is essentially a justiciable issue, and it is most unfortunate that, through disagreement on the tribunal, we are without any judicial pronouncement on the questions involved. The disadvantage of the absence of such a tribunal is illustrated by the recent decision of the Privy Council to have argued before it the question of the validity of the Irish Act of 1933 abolishing the appeal to the Crown in Council.<sup>2</sup> It is impossible to expect the Free State to treat as in any way binding the proceedings of a tribunal on which it is not represented, and, in the absence of arguments for the validity of the Act by representatives of the Free State, the tribunal cannot be in a position to deal with full effect with the matter.

## 118. WESTERN AUSTRALIA AND SECESSION

*To the Editor of THE SCOTSMAN, 20 November 1934.*

Constitutionally, it must be recognized, Western Australia has clearly no case for action by the British Government or

<sup>1</sup> The case for a tribunal was urged by Sir Stafford Cripps, House of Commons, July 11 and 16, 1934 (*Debates*, ccxcii. 338 ff., 899 ff.).

<sup>2</sup> See *The Times*, Dec. 4 and 5. It is most invidious for any tribunal to have to decide its own competence as against a sovereign legislature, and for the Lord Chancellor to deal judicially with an issue on which the British Cabinet has announced a definite view in which he must as a Cabinet minister concur.

Parliament. Nothing is more clear than that the Commonwealth Constitution which was deliberately accepted by the majority of the people of the territory on the referendum leaves amendment solely to the Commonwealth Parliament and the people. In precisely the same spirit, the final interpretation of the Constitution was reserved to the High Court, unless it thought fit to allow a decision by the Privy Council. It is perfectly true that the Imperial Parliament could, so far as mere law was concerned, destroy the Commonwealth Constitution, and that the Commonwealth has not declared the Statute of Westminster in force. But it would be a revolutionary action and wholly unconstitutional for the British Parliament to pass at the instance of one State any legislation interfering with the federal tie, and it is inconceivable that the Government of the State can expect any such action. It would be equally unconstitutional for the British Government to urge any further concessions to the State by the Federal Government. Whatever is to be done will have to be done by the action of the State and its people in persuading the rest of Australia of the justice of the claim for better terms. It must, however, be noted that Tasmania and South Australia have been in some measure reconciled to their position by generous increases in their federal grants, and that Western Australia for many reasons is rather isolated.

The truth is that Western Australia acted unwisely in accepting federation, and the obvious lesson to be derived from her fate is that the Indian States will be well advised to consider closely the position which they will occupy if they accept federation without securing the right on due notice to withdraw. Federalism in theory and practice may easily mean the sacrifice of some part of a whole for the benefit of other parts. It is quite arguable that the maritime provinces of Canada have lost by federation, into which Nova Scotia at least was impelled by the British Government, while Parliament turned a deaf ear to her appeal for release, though made immediately after federation, and supported by the

almost unanimous voice of the electorate. It is essential to remember that the vote in Western Australia is not overwhelming.

### 119. WESTERN AUSTRALIA AND SECESSION

*To the Editor of THE SCOTSMAN, 26 November 1934.*

I have always held that Western Australia made a grave error in entering federation, and I sympathize deeply with the present plight of the State, which should serve as a warning to Indian princes to think long before they commit themselves to an indissoluble federation. But the delegation errs when it thinks that I have an imperfect knowledge of the extent of the State's disabilities.<sup>1</sup> I have studied the *Case* with great care, but it is fair to the Commonwealth to point out that there is another side to the matter. It is set forth in chapters v-xii of the *Case for Union*, compiled by Sir R. Garran and Mr. J. H. Keating, two of Australia's leading jurists, and by Messrs. Somerville and Gilbert of Western Australia, the former of whom is a member of the Arbitration Court. No candid student of the two cases will deny that Western Australia has grievances, but equally he will feel with the overwhelming weight of Australian opinion outside Western Australia that it is a serious exaggeration to talk of 'a matter of economic life and death'.

Moreover, the case for the State is gravely weakened by the fact that on the referendum 138,653 voted for secession, but 70,706 against it, and that at the same time the electors returned to power a Labour Government, headed by Mr. Collier who on May 14, 1934, reiterated his personal opposition to secession and who on November 22, 1932, admirably summed up the constitutional position in the words: 'The Imperial Parliament has learnt its lesson and would not give a consent

<sup>1</sup> The delegation, sent to support the petitions for secession, replied to No. 118 in a letter which appeared in *The Scotsman*, Nov. 26, 1934. To No. 119 the Delegation attempted no reply.

which might cause disruption in any Dominion of the British Empire.' The Labour Government, in sending the delegation, is acting loyally under the result of the referendum, but it is perfectly clear that the demand from the State lacks entirely that unanimity which alone would render British intervention conceivable.

The view of the unconstitutionality of British action which I expressed in 1931<sup>1</sup> was elicited by the request of an able and ardent supporter of secession; it is shared, I believe, by the overwhelming majority of Australian jurists, and I have no doubt that it will be homologated by the Law Officers of the Crown and the British Government and Parliament. The delegation has a definite duty to perform but its purpose cannot be achieved without disaster to the Empire.<sup>2</sup>

<sup>1</sup> Published in the *Western Australia Daily News*, Nov. 27, 1931. It ran as follows: 'That decision (i.e., the original decision to federate) binds the State unless and until it is proved that continued membership of the Commonwealth is destructive to its welfare, when the right of separation might be claimed. The Imperial Parliament's authority is in formal law absolutely sovereign, and cannot be relinquished, therefore it still has power to exclude a State from the operation of the Commonwealth Constitution Act, nor will the passing of the Statute of Westminster diminish in law its sovereign power, but its exercise would be totally unconstitutional and could not be contemplated by the British Government unless proof of absolute necessity for the innovation could be adduced. It would be extremely difficult to adduce such proof.'

<sup>2</sup> So doubtful was the right of the Houses of Parliament to entertain such a petition held to be that in both it was held that a special report must be prepared as to the admissibility of the petitions presented.





## II

# INDIAN CONSTITUTIONAL REFORM



## 1. INDIA AND THE DOMINIONS

*To the Editor of THE TIMES, 29 June 1918.*

It is earnestly to be hoped that the representatives both of the Dominions and of India at the Imperial Conference will act on the advice given in your leading article of the 28th inst. and will arrange for the speedy carrying into effect of the principle of reciprocity in immigration matters which was accepted at the meeting of 1917.<sup>1</sup> Nothing has done more to lessen the value of the Conference as an institution than the interminable delays which have taken place in making effective agreements arrived at.

Delay, however, is clearly inevitable in this case if Imperial legislation is required, as suggested in your article, to confer powers on the Government of India. But I would suggest that there is no necessity for such legislation, and that the Government of India can be clothed with all the powers required by the action of the Governor-General in Legislative Council. The Government of India Act 1915, re-enacting much earlier legislation, confers by Section 65, power on the Governor-General in Legislative Council to make laws 'for all persons, for all courts, and for all places and things within British India', and 'for all subjects of his Majesty and servants of the Crown within other parts of India'. There is no restriction on the exercise of this power which does not apply equally to the legislation of the Dominion Parliaments, while the Crown Colony Government of the Transvaal obtained its power to exclude Indian immigrants from a legislature erected merely by the Royal prerogative. All, therefore, that now seems requisite is for India and the Dominions to determine the mode in which control of Dominion immigrants into India is to be applied, and the responsibility for doing this rests primarily with India's representatives.

<sup>1</sup> Keith, *Speeches and Documents on Indian Policy*. ii. 135.

## 2. THE GOVERNMENT OF INDIA BILL: IMMUNITY OF MINISTERS

*To the Editor of THE TIMES, 4 December 1919.*

That the India Office should defend, as is done in your issue of yesterday, the draftsmanship which extends in the Government of India Bill to Ministers immunities granted to the Governor-General, Governors, Lieutenant-Governors, and Executive Councillors is natural, but Sir E. Chamier's reply to my criticism reveals how far he is from comprehending the vital character of the change in the government of India brought about by Mr. Montagu's Bill.

In this country and in the self-governing Dominions it is an essential principle that every Minister is amenable to the law courts for his actions, and it is owing to this admirable principle that British subjects in these countries are secure in person and property against ministerial wrong-doing. When the office of Minister is created in India, every consideration of precedent and principle demands that he should, as regards the Courts, be placed in the same position as every other holder of ministerial office in the British Empire. Instead of this, the Bill places Ministers in the position of freedom from control which was first granted to Warren Hastings. Comment on such a proposal in 1919 seems needless.

But, I must repeat, Ministers will be even better off than Warren Hastings, who desired to return to England, and so brought himself within risk of retribution, and than Executive Councillors, who, if European, suffer from the same disability. In the case of Ministers the safeguards of (1) control by official superiors and ultimately Parliament, and (2) possibility of action in the High Court of England are non-existent; the proposed extension of immunity to Ministers is therefore wholly unjustifiable, and is explicable only on the theory that it slipped in, as I apprehend was the case, as a consequential

amendment, which unhappily, the India Office is not now willing to disavow.<sup>1</sup>

### 3. INDIAN AUTONOMY: LACK OF APPRECIATION

*To the Editor of THE TIMES, 5 October 1920.*

Your comment of Saturday on the report of the Army in India Committee, and the apologia which it has elicited from the India Office, serve to illustrate the curious lack of appreciation prevalent in the United Kingdom of the fundamental facts of the position of India. The Committee, the India Office, and Parliament alike are plainly under the impression that the development of responsible government in India will be a leisurely process, conducted at the rate of speed which seems good to them. They ignore the fact that nothing save the abstention of Indian politicians from the use of the powers now put in their hands can prevent the growth of Indian autonomy with a swiftness wholly beyond their anticipation. Two considerations alone are sufficient to show that forecasts made in 1917 are wholly out of date. India has been accorded a place in the League of Nations, which is justifiable only on the assumption that almost immediately she will be a completely autonomous part of the Empire on the same plane as the Dominions, and Egypt has been assured of practically complete independence in internal affairs. Any attempt to hold India long in a position of virtual dependence is bound to fail, and it is a fundamental defect of the report of the Army Committee that this fact has never been clearly apprehended by them. Every consideration of prudent statesmanship demands that before any final decisions are taken on the recommendations of the report, the matter should be brought before the new legislature in India. To confront that body with a *fait accompli* would merely play into the hands of the faction in India which denies the sincerity of the British Government's reform policy.

<sup>1</sup> It may be hoped that in 1935 this anomaly may disappear. See also Keith, *Cmd.* 207, pp. 56, 57.

Further evidence of inability to appreciate the new situation is afforded by the failure of the India Office to make explicit to candidates for the India Civil Service the effect on their career of the political changes which are inevitable, though these must totally alter the conditions hitherto prevailing. Moreover, in justice both to the finances of India and to civil servants, steps should now be taken to draw up definite scales of pension payable to men who may find it necessary to retire from the service as political changes render their positions in effect untenable. The extension of responsible government must mean in India, as in the Dominions, the reduction to the minimum of the employment of men from overseas, and the events of 1906-7 in South Africa should be satisfactory proof of the dangers of taking short-sighted views in these matters.

#### 4. INDIANS IN KENYA: EQUALITY OF TREATMENT

*To the Editor of THE TIMES, 1 August 1921.*

It must presumably be the serious failure of publicity with regard to the proceedings of the Imperial Conference that has led Sir W. Joynson-Hicks and his colleagues into the error of ignoring the fact that the issue of the position of Indians in Kenya Colony has formed an important part of the proceedings of that body, and that the Secretary of State has already, and most properly, admitted that racial discrimination within territories over which the Imperial Government exercises control, cannot be permitted.

Nothing can be more unfortunate than the attempt to use the protection of the natives as a ground for refusing equal justice to Indians. The well-being of the native population assuredly demands that their fate should not be entrusted to the representatives of the British or the Indian settlers in the colony, but it certainly does not require that Indians should be treated as an inferior race. No sane British statesman can

desire to create in a territory under Imperial control the difficulties which exist in the Transvaal or Natal.

It would be interesting to know by whom the 'white British population' were 'invited to colonize East Africa on the supposition that it would be retained as a white man's colony'. As far as I can ascertain, there is no authority whatever that such an invitation was ever made by the Imperial Government, which alone could hold out any such prospect. Nor can I understand how the concession of the franchise on equal terms to Indians would 'convert a British colony into an Indian dependency'. No sane person contemplates the grant even of representative government to the colony.

In one respect only do I concur in Sir W. Joynson-Hicks's views; this case confirms the view, which I shared with the majority of my colleagues on Lord Crewe's Committee in 1919, that the establishment of a Joint Select Committee on Indian Affairs to deal with issues such as this was neither desirable nor likely to prove effective.

## 5. INDIANS IN KENYA

*To the Editor of THE TIMES, 4 August 1921.*

As the public may be excused an ignorance hardly creditable to a colonial legislator, it may be well to explain that representative government in the terminology of colonial constitutional law denotes a form of government in which the executive government is carried on under the control of the Secretary of State for the Colonies, but legislation is enacted by a body in which the executive does not by means of nomination or otherwise command a majority. Such a form of government in the colonies has often proved the prelude to the adoption of responsible government. Needless to say that such a form of government is wholly out of place in a case where the white settlers form an insignificant fraction of the

<sup>1</sup> Committee on the Home Administration of Indian Affairs, *Cmd* 207, pp. 13 (majority), 55, 56 (my minority report).



total population, and the Crown has definite obligations in respect of the safeguarding of the native population, and Lord Milner's alleged grant of this form of government to Kenya Colony has no existence outside the imagination of your correspondent.

## 6. THE INDIAN LEGISLATURE AND THE ESHER COMMITTEE'S REPORT

*To the Editor of THE TIMES, 9 November 1921.*

The Aga Khan's intervention induces me to renew the suggestion which I have already made in your columns that the Government of India should defer action on the report of Lord Esher's Committee until it has consulted the Indian Legislative Assembly. If the Assembly shares the views of the Aga Khan, the Government should defer to its judgement unless it considers that this is impossible consistently with the safety of India itself, in which event it would be entitled to override the Assembly so far as was necessary for the security of India, but not merely to facilitate a wild policy of Imperial adventure.

The pledge of 1917 to India is open to two interpretations: the first, adopted by Lord Esher's Committee and the majority of my colleagues on Lord Crewe's Committee of 1919, contemplates a period of indefinite but prolonged duration before the legislatures of India exercise any real control over important issues. The other—and I hold the only just—interpretation gives the British Government a reasonable period in which it must employ its best efforts to render Indians capable of effective self-government.<sup>1</sup> From the outset, I contend, the co-operation of the legislatures should be asked on every issue, and they should be overridden only in the last resort. The policy of Lord Esher's Committee, on the other hand, is to

<sup>1</sup> See my minority report on the Home Administration of Indian Affairs (1919), *Cmd.* 207, pp. 36-60.

remove once and for all the control of the Indian forces from the power of the Assembly.

A frank policy of co-operation with the Assembly is the only method by which to secure permanent relations of unity between Great Britain and India; the plan of reluctant yielding to pressure will merely play into the hands of the extremists, and repeat in the case of India the fiasco of Ireland.

## 7. THE SITUATION IN INDIA

*To the Editor of THE SCOTSMAN, 9 March 1922.*

The gravity of the official news from India, which merely confirms information available from private sources, renders it opportune to consider whether any steps are possible to improve relations between Great Britain and India. Three points are at present of special interest:

(1) Mr. Churchill's policy in Kenya, which means nothing more or less than the exclusion of Indian immigration, is wholly indefensible when based, as it is at present, on the interests of the white settlers. As Sir F. Lugard has recently shown, the interests of the natives of Kenya are now strongly opposed to any substantial immigration of either Indians or Europeans, and restriction on immigration in either case would be wholly justifiable. The differential treatment on racial grounds of Indians already settled in Kenya cannot be defended on any principle whatever, and Mr. Churchill, who encouraged Indian immigration, should be the last to approve it.

(2) The revision of the Treaty of Sèvres in favour of Turkey will doubtless be shortly undertaken. But it may be taken as certain that we cannot meet the desires of the Mohammedans of India in this regard, for to do so would involve us in grave danger and difficulty. The obvious truth is that the Mohammedan demands are pitched so high as they are with a view to make it impossible for them to be conceded. It is a vain delusion, which has unhappily deceived Lord Northcliffe, that by concessions to Moslems we can divide the people of India,

and use Moslem aid to postpone further reforms. The gulf between Moslem and Hindu is very deep, and it will reveal itself later in its real strength. But no concession which we can now make to Moslem feeling will avail to break the present union against the Government, and those who persist in the belief in this policy will have a painful awakening.

(3) It is idle to hope to meet the situation without very substantial concessions in the way of self-government. The independence of Egypt has been conceded, and Mr. Churchill's menaces are quite insufficient to overawe India. We could not repress revolt in Ireland; what chance have we of maintaining India in unwilling subjection? We were not prepared to find the men or money to deal with Ireland; can we find them in far greater numbers and amount for the idle purpose of checking for months or years the outward manifestations of Indian unrest? Present conditions in India are ruinous enough for British trade; but what trade will there be if we enter on a régime of mere suppression?

I repeat my suggestion that the time has already come (1) to entrust to Ministers the control of all provincial matters in provinces under Governors, and (2) to transfer to Ministers those functions of the Central Government which are not immediately concerned with foreign affairs, including relations with native States and defence, these matters remaining in British hands pending the creation of an effective British army, capable of defending India from attacks from the frontier tribes and maintaining internal order without the use of British troops. Of the objections to this proposal I am well aware.<sup>1</sup> But the alternative is made clear enough by the Irish precedent. We shall have a period of futile attempts to repress, entailing doubtless as many (or more) atrocities as in Ireland, and at the end we shall have to make wholesale concessions in an effort—probably unavailing—to retain India even nominally within the Empire.

<sup>1</sup> The proposals were in fact only adopted in 1933 as the policy of the British Government; *Cmd.* 4268.

I may add that the Government appears to me to be assuming a very serious responsibility in persisting in the recruitment of Europeans for the Indian Civil Service under present conditions, and that the practice of bringing to this country for education and training Indians selected locally for that service seems wholly without justification.

## 8. INDIANS IN KENYA

*To the Editor of THE TIMES, 1 May 1923.*

A strong case has been made by the Rev. Dr. Arthur on behalf of the African population in favour of the restriction of Indian immigration into Kenya, and the refusal to resident Indians of the franchise on the same terms as it is accorded to British settlers. On the other hand, it is obvious that to accept this position is definitely to deny racial equality even within that part of the Empire which is controlled by His Majesty's Government, and to undermine the foundation of equity on which alone the relations of India and the United Kingdom can be securely based.

It seems, however, that Dr. Arthur's principles point to a result which he has not fully appreciated. If, as is just, the interest of the African population should be the determining motive in British policy, it seems clearly to follow that to British immigration no less than Indian strict bounds should be set, and that it should be made absolutely clear that the policy of the local Government and its legislation shall remain under Imperial control until the Africans themselves, at some distant time, come to be able to take effective part in their own government. That the Indian settler desires to exploit the native race may be admitted, but the same contention applies equally to the British; all experience, notably in South Africa, establishes that to create a dominant white population is inconsistent with normal native development.

From the point of view of Imperial relations the one effective solution of the difficulty in Kenya is to recognize that neither

British nor Indian settlers should be considered as primary elements, but that the territory should be preserved for African development.<sup>1</sup>

### 9. THE INDIAN PROBLEM

*To the Editor of THE SCOTSMAN, 14 November 1930.*

On two very important points the Government of India in its dispatch reveals the hesitation and lack of constructive vision characteristic of official views. It is clear, in the first place, that it clings far too closely to the consideration of the future of British India, and therefore has failed to realize the fundamental importance of the suggestions of the Simon Commission regarding the future of India as a federation embracing the Indian States. It was because of this ideal that the Commission insisted on refraining from any attempt for the present to create a central legislature of the normal federal kind, as seen in Canada or the Commonwealth, with control over the Executive, and pressed instead for the evolution of the provinces as in great measure autonomous units, which later could be federated with the States under a distinctive form of federation devised to meet the quite unique conditions of India. It is clear that the prospects of a satisfactory solution of the federal issue must be seriously impaired if the advice of the Commission is not given fuller weight than the Government of India seems to accord to it.

Secondly, it is disappointing to find that the Government of India appreciates so little the very remarkable suggestion of the Commission with regard to the future of Indian defence. The Commission recognized that, having regard to the frontier dangers and the risk of foreign aggression, India must for an indefinite, but certainly prolonged, period require for its defence substantial numbers of British officers and men acting under a control mainly British. It recognized also that the

<sup>1</sup> Cf. the Report of the Joint Select Committee on Closer Union in East Africa, 1931.

control of such a force could not be surrendered to the Government of India if that ceased to be under British authority, and that accordingly there would be interposed a fatal barrier to India attaining responsible government at any date which could be foreseen. It contemplated, therefore, giving control over the Army to the Imperial Government under an agreement with the Government of India which would have safeguarded the process of Indianization, and prepared the way for future advances in self-government. The first stage in the advance would have been the creation by India of forces of her own adequate to secure internal tranquillity, and to relieve the Army under Imperial control from employment for this end; the second would have been the taking over of full control when the process of Indianization had gone far enough to permit of this being done with safety. The scheme offers what appears the only practical solution of the difficulty of the defence issue. It is naturally disliked by Indian opinion, because that considers it reasonable to demand that the services of British troops should be placed at the disposal of a responsible Government in India, and equally naturally it is unpopular with those who use the defence issue as an insuperable objection to any serious progress in granting autonomy to India. But it is regrettable to find that the Government of India has not had the insight to recognize the necessity of exploring thoroughly and in the most constructive spirit the possibilities offered by the proposal, perhaps the most important in the report of the Commission.

#### 10. LORD READING AND THE INDIAN CONSTITUTION

*To the Editor of THE SCOTSMAN, 6 January 1931.*

One matter of importance is left obscure in Lord Reading's exposition of the Liberal attitude towards Sir Tej Bahadur Sapru's scheme for the introduction of a measure of responsibility to the Assembly in the Central Government in India.

He has been converted to the view that non-elected Ministers appointed to deal with the reserved subjects should sit in the Cabinet and fall with it in the sense that they must resign on the resignation of the Cabinet. It seems, however, impossible to suppose that the resignations of such Ministers are to be taken seriously. If the Ministry is compelled to resign on an issue within the area of non-reserved subjects, it would be absurd for the Viceroy to have to replace the Ministers in charge of reserved subjects by other nominees, and it must therefore be assumed that resignation of such Ministers would merely be formal, and that it would be entirely within the right of the Viceroy, without any breach of constitutional propriety, to reappoint them to their offices forthwith. In these circumstances it must seem dubious whether there is any useful purpose to be served in requiring formal resignations.

Moreover, the rule of resignation is open to a further objection in connexion with reserved subjects. No doubt under the new Constitution Lord Reading contemplates that the Viceroy would have power to prevent the discussion of any motion proposing to overthrow a Ministry because of some action taken by a Minister in charge of a reserved subject. But the Viceroy could not effectively prevent the passing of a motion of no confidence in the Ministry, which in reality was based on objections to a matter of policy in respect of a reserved subject, but was not formally expressed to this effect. Thus in substance the Assembly would be enabled to compel the resignation of the Ministers in charge of reserved subjects when it disliked their policy, and the Viceroy would be compelled either to displace these Ministers or to incur the reproaches of the Assembly for flouting its disapproval of the Ministry.

Whatever may be said in favour of introducing dyarchy in the Central Government, contrary to the advice of the Statutory Commission, there seems nothing to be said for giving the Assembly power to force the resignation of Ministers in charge of reserved subjects, but not to control the policy of the Govern-

ment in regard to these subjects.<sup>1</sup> Sir Tej Bahadur Sapru, of course, really means to secure the Assembly control over subjects nominally reserved, and his machinery is intended to bring about this result. Lord Reading has clearly no intention of parting with control of reserved subjects, but it seems that nothing but confusion and ill-feeling can be produced if Ministers are compelled to resign, but are immediately reinstated, and policy is unaffected. As long as subjects must be reserved, it should be clear that the tenure of office of Ministers in charge of them is independent of the Assembly. Joint consultation between members of the Ministry is clearly to be desired, but responsibility cannot be divided; Ministers must be subject either to the Viceroy or to the Assembly, and the only chance of working responsible government as regards central subjects rests on the Assembly contenting itself with exercising complete control over Ministers in charge of those subjects which are not reserved. The difficulty of achieving this result explains the opposition of the Statutory Commission to dyarchy.

## II. RESPONSIBILITY IN THE CENTRAL GOVERNMENT OF INDIA

*To the Editor of THE SCOTSMAN, 13 January 1931.*

It would seem from Lord Reading's surprise at the suggestion for the reduction of the British forces in India that he has hardly realized the vital character of the decision now taken, contrary to the definite advice of the Statutory Commission, to accept the doctrine of the introduction of responsibility in the central government of India. This is a far more important decision than the declaration of Dominion status of the Imperial Conference of 1926, which merely recognized accomplished facts. The reservations proposed may well be accepted

<sup>1</sup> This view is now adopted by the Joint Committee on Indian Constitutional Reform (*Report*, i. 104).



by Indian politicians, for they realize that they are bound to be ineffective, and that in practice the Viceroy will have no alternative but to allow Ministers to have virtually the decision even on those matters which are in theory reserved to his control. Doubtless the plan of reservations will aid in the transition by relieving Ministers from immediate responsibility, but the history of efforts to reserve subjects from the control of Colonial Governments is conclusive of the impossibility of such action having any enduring success. Even as regards the Indian States, it is clear that the Viceroy will not in the long run either have the motive or the power to adopt a policy which is contrary to the wishes of his Ministers, however little in theory they have to do with the matter. The essential fact, as the history of India under the reform scheme shows, is that government cannot be divided into compartments operated under different authorities. The responsibilities of Ministers for central government will be so great that it will prove necessary to give them responsibility in all issues.

In return for this fundamental concession it may be hoped that Indian statesmen will accept two principles. In the first place, India should accept absolutely responsibility for its debts; already there has been the ominous suggestion of reconsideration of the allocation of charges as opposed to repudiation, and on that subject the history of the undertaking of the Irish Free State to pay a proportion of the British debt is a sufficient warning. Secondly, the fullest equality ought to be accorded to British individuals and companies trading in India and to British shipping registered in the United Kingdom. No secret has ever been made by Indian politicians of the desire to oust United Kingdom shipping from the coasting trade and to deny to British companies privileges, concessions, and monopolies in favour of Indian companies. To ask for the renunciation of differentiation, in return for the adherence of the United Kingdom to the same principle, is certainly not unreasonable.

## 12. MR. CHURCHILL AND INDIA

*To the Editor of THE SCOTSMAN, 21 January 1931.*

There is one point on which Mr. Churchill's view of the Indian question is undoubtedly sound. His experience of responsible government has shown him that the decision to confer responsibility in wide measure on the Central Government of India is incompatible with imposing effective safeguards. Lord Sankey's assurance that 'Great Britain will fulfil her trust; she will be the protector of your minorities, the guardian of your poor and depressed', is based on the delusive hope that in internal matters control can be exercised from the United Kingdom over the administration and legislation of a responsible Government. As responsible government cannot now be withheld, the one hope for minorities and the depressed classes is the construction of the Constitution in such a manner that they will receive protection from the Courts and the Privy Council, the method by which the racial and religious minority of Canada has secured its rights. If they put faith in reserved powers of the Governor-General, they will certainly be disappointed. The British mercantile community has wisely recognized this fact by determining to secure their rights by the means of a convention with India on a basis of reciprocity, any infraction of which will be redressed ultimately by judicial means.

The Indian Princes have been gratified by the formal adoption of the doctrine that in matters not ceded to the Federation their relations will be with the Crown, acting through the agency of the Viceroy. This safeguard, it must be pointed out, is merely formal. There is nothing to prevent the Crown deciding to allow the Viceroy's action to be guided in fact by the views of his Ministers. Indeed, if he is in cordial relations with them, he will himself be strongly inclined to take their view of issues affecting the States, and it is most improbable that the British Government would dream of interfering with a policy advocated by the Viceroy. It is significant that it has

just decided not to continue the system under which the Governor-General of the Union of South Africa controlled Basutoland, Swaziland, and the Bechuanaland Protectorate, presumably because it was felt that the Governor-General must necessarily look at issues affecting these territories too much from the point of view of the Union Government, though he was in this matter absolutely independent of it.<sup>1</sup>

Further, it seems imperative that in view of the new policy the question of further recruitment on the present lines for the Indian Civil Service should be reconsidered. It seems wholly unjustifiable to invite young men of ability and promise to enter a career whose future is so uncertain. Pensions on premature retirement are poor satisfaction for an interrupted career.

### 13. INDIA AND THE DEBT QUESTION

*To the Editor of THE SCOTSMAN, 5 February 1931.*

Mr. Gandhi's demand for arbitration on the public debt of India is of fundamental importance, because his view is shared by Indian politicians in general, and the Round Table Conference report is so worded as to evade any pronouncement on the issue. The demand, of course, is based on the precedent of the Irish Free State. In the treaty arbitration on the debt question was duly provided for, but ultimately, presumably in the interest of goodwill, the whole claim was surrendered by a Conservative Government. It is not surprising that the average Indian politician is unable to see why this excellent precedent should not be followed, and efforts to differentiate the cases are not likely to convince him. As long as the recommendation of the Statutory Commission against the introduction of responsibility in the Central Government stood, the issue presented comparatively little danger, but Mr. Baldwin's

<sup>1</sup> My views on the worthlessness of safeguards were shared by the late Jam Sahib of Nawanagar, whose citation of them was followed by Lord Willingdon's action in calling him to order (March 25, 1933); see *Morning Post*, June 28, 1933; July 19, 1934.

promise and the attitude of the House of Commons on the Conference report render it inevitable that responsibility will be conceded at no distant date.

In these circumstances it seems deeply to be regretted that those who consider Mr. Baldwin's policy unwise, as does Mr. Churchill, do not concentrate on what is still practicable, the insertion of effective securities for British financial interests and the interests of minorities, including the British commercial community. Mr. MacDonald seems to contemplate nothing more serious than paper safeguards, and the Conference report suggests that there is to be recourse once more to the useless system of giving the Governor-General overriding powers against the Government which is to be really responsible. The only effective safeguards are those dictated by all experience of federal constitutions, the action of the Courts based on explicit rights granted in the constitution, but such protection will certainly not willingly be conceded by Indian politicians who, as students of the constitutional history of the Dominions, are perfectly well aware that safeguards which rest on executive action, whether by the Governor-General or the Imperial Government, will in practice prove unworkable. But Indian minorities themselves can only secure protection in this way, and, if any statesmanship is now displayed in the United Kingdom, it should still be possible to avoid the repetition of the errors made in the case of the Irish Free State, which has successfully repudiated every form of control.

#### 14. LORD SANKEY AND INDIA

*To the Editor of THE SCOTSMAN, 19 March 1931.*

I note with much regret that Lord Sankey in the debate yesterday refers to the safeguards entrusted to the Governor-General as a means of securing the safe operation of the new Constitution proposed for India. It seems strange that an English judge should not have troubled to consult precedents; had he done so, he would assuredly have discovered that it is

idle to hope to secure results by the exercise of discretionary power by a Governor-General. Even in the case of Canada, where the Governor-General had not to act merely on his discretion but had the support of the Federal Ministry, it has been found necessary to abandon the plan, provided for in the Constitution as an essential feature, under which Federal interests were to be protected against Provincial encroachment by the right to disallow Provincial Acts. The only safeguards which experience shows can work are arrangements, such as the Mohammedans demand, for effective representation in the Legislatures, and the grant of power to the Courts to protect minority rights under clearly defined legal provisions. So far the intervention of the Courts has been deliberately ignored as a possible means of securing the interests of European traders and residents, but, if these are to be safeguarded, it can only be by means of a precise definition on a basis of reciprocity, with provision for interpretation by an inter-Imperial tribunal and thereafter enforcement, if necessary, through the Courts.

It is, of course, true that the Statutory Commission Report proposed to safeguard responsible government in the Provinces by the discretionary authority given to the Governors. But that suggestion rested on the essential assumption that the Government of India was to remain supreme, without control by an Indian Legislature, so that Governors would have the necessary support in difficulties. Now that this fundamental safeguard, which is at the root of the Commission's Report, is to disappear, the position of the Governors, as proposed by that Report, becomes in the extreme difficult, and it may safely be assumed that Governors will not be able to carry out the functions ascribed to them in the Report. Indeed, even under the scheme of the Report, several experienced administrators doubted the possibility of independent action. Under the new scheme even the Governor-General will be forced in practice to accept ministerial advice. It is significant that the Round Table Conference would not even consent to accept unanimously the need for continued European recruitment in the

Indian Civil Service and the Indian Police Service, while the Statutory Commission made retention of recruitment on the Lee Commission scale an essential part of its recommendations.

If safeguards are deemed unnecessary by the British Government, they should frankly say so; but the present policy appears to be one of inserting unmeaning provisions in the hope that they will be accepted by Indian opinion as not intended to be effective, and by British opinion as securing all that is requisite.

## 15. BRITISH EXPORTS TO INDIA

*To the Editor of THE SCOTSMAN, 26 March 1931.*

As some confusion seems to exist as to the position of British exports to India under the changes contemplated in the Constitution, it may be worth while briefly to state the present position of the question. Under the fiscal convention developed under the Constitution of 1919, the terms on which British exports enter India are decided by the Government of India acting in agreement with the Legislature, without interference by the Secretary of State. That Convention the Statutory Commission did not propose to disturb. The justification for this position was, of course, that the Commission insisted that the Government of India should not be made responsible to the Legislature, and it was felt that an official Government controlled by a British Viceroy could be trusted, while placing Indian interests in the foreground, not to be oblivious of the importance of British export trade and the moral claims of British workers for considerate treatment in view of the safety from external attack and the preservation of internal order secured by the connexion of India with the United Kingdom.

With the decision to give India a Central Government responsible to a Federal Legislature a new situation arises, and the question is whether any security can be provided in the new

Constitution for British export trade. When drafting for the European delegation to the Round Table Conference a convention based on the principle of reciprocity as a part of the Constitution, in order to secure for the British mercantile community in India freedom from discrimination in favour of the Indian mercantile community there, I suggested clauses to give to British exports to India, on a basis of reciprocity, at least as favourable treatment as exports to India from any other country, British or foreign. The Report of the Conference shows that the Indian delegates have accepted, if reluctantly, the principle of a convention to forbid discrimination against the British mercantile community, but as regards treatment of British exports it preserves a significant silence. The European delegates, of course, were not primarily concerned with this issue, which was the affair of the representatives of the British political parties. If the matter is allowed to stand in its present position, the new Constitution will not contain the slightest safeguard against the legal prohibition of the entry of British exports, or the imposition of prohibitive duties, or differentiation in favour of Japanese or other foreign products. The matters in which special powers have been reserved to the Governor-General have been carefully defined to exclude any power of intervention on this score.

It may be that there are political or economic reasons fatal to the adoption of the very modest measure of security suggested above; but, at any rate, it is important that British manufacturers and workers alike should fully realize that, as matters stand, Indian politicians have a clear right to hold that the new Constitution will leave the Indian Legislature absolute freedom to accord whatever treatment it thinks fit to British exports and to prefer at pleasure foreign goods.<sup>1</sup>

<sup>1</sup> The Joint Committee provides against discrimination by giving a special responsibility to the Governor-General, but recognizes that only by an agreement between the United Kingdom and India can matters be duly arranged; see *Report*, i. 204 ff. See Nos. 19, 40, and 41, *post*.

## 16. THE INDIAN SITUATION

*To Mr. L. N. Gubil Sundareshan, Teppakulam, Trichinopoly, 11 July 1931.*

I have your letter of the 17th June reminding me of your conversation with me on Indian affairs when you visited Edinburgh four years ago and asking me for an expression of my views on the present situation regarding constitutional reform.

I am happy to say that there exists here a most sympathetic feeling towards Indian aspirations for self-government and that a satisfactory settlement of the Constitution would be received with general approval. Perhaps more clearly than in India we realize, for example from the present crisis in Germany, how important it is to assure safeguards in the Constitution for the maintenance of the financial security of India, the overthrow of which would have the gravest consequences for Indian progress. We realize also that the minorities must be effectively secured, and we are not wholly clear how due provision is to be made for this end, and how, for instance, the uplift of the depressed classes is to be assured. I am also very anxious to see the adoption as between the United Kingdom and India of a régime of complete reciprocity in matters of immigration, trade, the exercise of professions, and so forth. The plan of Indianizing the army is generally accepted, and it is obvious that in external policy Indian interests will best be conserved by membership of the British Empire and of the League of Nations. In these circumstances it ought to be possible at the Conference in September to achieve an effective agreement. But, of course, much depends on the negotiators. If there is insistence on demanding the right of separation from the Empire and the repudiation of debts and the confiscation of the interests of the British traders, there will be grave danger of an impasse. But personally I cannot suppose that Indian politicians are really likely to advance untenable claims and



thus to throw away an extremely favourable opportunity for a definite settlement.

### 17. LORD IRWIN AND DOMINION STATUS

*To the Editor of THE SCOTSMAN, 20 July 1931.*

Lord Irwin claims, doubtless with much reason, that 'it was implicit, in the declaration of 1917, that the natural issue of India's constitutional progress as then contemplated was the attainment of Dominion status', and he criticizes Mr. Churchill on the score that, having been a member of the Government which authorized the declaration, he now objects to steps being taken to translate into reality the purpose therein expressed. In this criticism Lord Irwin ignores the important consideration that the politicians of 1917 could only contemplate Dominion status as it then existed, and that they could not pledge themselves to the doctrine that, whatever changes took place in that conception, it was still to be held applicable to India.<sup>1</sup> Lord Irwin may be right in holding that the greatly enlarged conception of Dominion status should be adopted for India, but it is clearly improper to contend that the declaration of 1917 committed the British Government to any such view. Moreover, it is dangerous, for it encourages expectations among Indian politicians of the more advanced school which Lord Irwin himself would not propose to satisfy.

The danger is clearly exemplified in the demand made in certain quarters in India that the right of India to absolute independence, as inherent in Dominion status, should be established at the Round Table Conference when it resumes work. It is understood that the Conservative party would not consent to any such discussion, and their position seems logical. But on Lord Irwin's theory it would be quite impossible to rule out such a discussion, for notoriously one Dominion Govern-

<sup>1</sup> The claim for India of a distinct membership of the League of Nations in 1919 was probably the decisive moment in determining that India was to be accorded the fullest measure of Dominion status.

ment at least holds it to be certain that Dominion status implies the right of secession, and that the Statute of Westminster, when enacted in a few months, will remove the existing legal barriers to such action.

## 18. INDIAN LIBERALS' DEMANDS

*To the Editor of THE SCOTSMAN, 3 August 1931.*

At the Round Table Conference very large concessions were made by the British representatives in the hope of securing an agreed settlement. It is most significant, therefore, that the National Liberal Federation in India should have repudiated two of the vital claims made in the interests of the United Kingdom. In the first place, while paying formal homage to the doctrine of non-repudiation of India's public debt, it has demanded adjustment by an impartial and independent tribunal. This, of course, is an imitation of the procedure in the case of the Irish Free State, and it is doubtless hoped that the outcome, as in that case, will be the transfer to the United Kingdom of a burden which is plainly incumbent on India. Secondly, the Federation has followed Mr. Gandhi in his repudiation of the agreement reached by the Conference that there should be no discrimination between the rights of the British mercantile community and firms and companies trading in India and the rights of Indian-born people, and that an appropriate convention based on reciprocity should be entered into for the purpose of regulating these rights. It demands complete freedom to take measures for the promotion of the basic trades and industries of India.<sup>1</sup> Such freedom has never been in question, and it has never been suggested that it should be limited. What is really desired is freedom to exclude British shipping from the coasting trade, and to differentiate against British firms engaged in trade in India,<sup>2</sup>

<sup>1</sup> Repeated by the Federation at its Poona meeting, Dec. 28 and 30, 1934.

<sup>2</sup> See Mr. S. N. Hajji's Bill to reserve the coastal traffic of India to Indian vessels (1929).

and to deny them the equality of legal rights which is accorded by the United Kingdom. It is earnestly to be hoped that at the forthcoming Conference all British parties will be united in resisting so unfair a demand, the injustice of which was recognized by the Round Table Conference as a whole after the fullest discussion of the topic.

### 19. THE PREMIER AND INDIA

*To the Editor of THE SCOTSMAN, 8 October 1931.*

There is an omission in the Premier's announcement of policy which may perhaps be accidental. He announces contemplation of 'mutual economic arrangements with the Dominions', but omits to mention India. It is, however, clear that in this matter the position of India already approximates to that of a Dominion, as control of tariffs has been assigned to the Indian Legislature, and any constitutional changes will admittedly go in the direction of extending that control by placing executive authority also in the hands of responsible Ministers. There seems, therefore, no possible objection to efforts to secure mutual arrangements with India on a basis of reciprocity, and it may be remembered that it was agreed at the last session of the Round Table Conference on January 19 that the position of representatives of British commerce in India could best be secured by a convention based on reciprocity. No constitutional objection can accordingly exist to an agreement for closer trade relations, and the advantages of such an arrangement to both countries might well be substantial. At least we may hope that the possibility of such action will be carefully explored.<sup>1</sup>

<sup>1</sup> A draft convention, with provision for judicial decision by an inter-Imperial tribunal, was prepared by the writer and submitted to certain parties interested. It was not proceeded with, as the plan was ultimately abandoned, apparently because Indian commercial interests were unwilling to concede fair terms to British trade, and some British commercial interests unwisely preferred the insertion in the Constitution of unilateral restrictions on Indian legislative authority, preferring immediate advantage to a settlement based on recognizing a partnership of interests on a footing of equality. As the Joint Committee (*Report*, i. 212) advocates a Convention, my draft is appended (No. 41).

## 20. MR. GANDHI AND THE INDIAN STATES

*To the Editor of THE SCOTSMAN, 14 October 1931.*

Your correction of Mr. Gandhi's misinterpretation regarding the position of Swaziland raises a further point, the importance of which has recently been appreciated by some of the Indian States. In the case of South Africa it has been felt necessary, in order to secure the effective operation of Imperial responsibility, to transfer the control of the Protectorates and Basutoland to an officer representing directly and solely the British Government, thus terminating the arrangement by which the Governor-General of the Union acted also as High Commissioner in charge of the territories.

In the case of India it has been made plain by the States that they expect that under a federal Constitution issues of paramountcy will not be determined by the Federal Government, but will be dealt with by the Crown as represented by the Viceroy. But it is obvious that it will be very difficult for the Viceroy to resist advising the Crown in the sense demanded in any conflict by the interests of the federation at the head of whose executive government he is placed. The suggestion of having a distinct Imperial representative for such questions offers great difficulties, and it may be necessary to seek a solution by some form of arbitral procedure.

## 21. BRITISH COMMERCIAL INTERESTS IN INDIA

*To the Editor of THE SCOTSMAN, 7 December 1931.*

As the debate in Parliament shows no recognition of the fact, may I call attention to the most unsatisfactory character of the proposals as to the protection of the interests of the United Kingdom commercial community in India which have now issued from the Round Table Conference as opposed to the agreement reached by that body on January 19, 1931?

The solution then arrived at was based on the essential character of that community, as composed of individuals and companies essentially connected with the United Kingdom

by domicile or place of registration, and it proposed to safeguard their rights by according to them the same equality of treatment with persons of Indian domicile and companies registered in India as is accorded in the analogous case in the United Kingdom, the mode adopted being that of an agreement scheduled to the new Constitution. This mode of protection has clearly appeared too complete to meet Indian views, and the scheme now adopted is to assimilate the community to other Indian minorities, such as the Parsees or Anglo-Indians, and to promise them the protection of a clause in the Constitution forbidding discrimination based on race, descent, religion, or place of birth, a doctrine which Mr. Gandhi also favours. Specious as it is, it requires only the slightest examination to show that the protection is worthless against a legislature which desires to discriminate against the United Kingdom community. It need only, to take an obvious example, confine insurance business to companies, a majority of whose directors are domiciled in India or have resided there for twenty-five years, to exclude all British registered companies from the business, and like methods are available effectively to transfer to Indian control those branches of business in which they desire a monopoly. It would be impossible to protest against such action, for it would be clearly within the legal rights of the Legislatures, for prohibition of discrimination on specific grounds is a definite intimation that discrimination on other grounds is licit. Protection which is adequate for real Indian minorities whose domicile is India is and must be unsatisfactory to the United Kingdom community in India.

It may be argued that discrimination ought to be permitted, or that in practice it will not be applied, but what I am concerned to point out is that the protection now offered is legally valueless, and that, if the community relies on its efficacy, they will suffer a severe disillusionment, and that, once the proposal is adopted in the Constitution, it will prove utterly impracticable to secure the insertion of any further safeguards.

## 22. BRITISH COMPANIES IN INDIA

*To the Editor of THE SCOTSMAN, 27 February 1932.*

May I call attention to the remarkable surrender as regards British companies doing business in India which, as the full report of the proceedings of the Round Table Conference now reveals, was made at the last moment by Lord Sankey to the claims of the Bombay merchants who support Mr. Gandhi?

It has been the aim of the European community to secure for individuals and companies alike a régime of equality, and this was definitely accepted by the final meeting of the first session of the Conference, when it was proposed to make effective the principle by means of a convention on the basis of equality. At the second session the British Government favoured the method of procedure by reservations in the Constitution, which is open to serious objections, but at least it safeguarded the interests of British companies as well as individuals, and the fourth report of the Federal Committee in Paragraph 18 placed companies and individuals on the like footing. But at the plenary session on November 28, 1931, Lord Sankey agreed, at the invitation of Sir P. Thakurdas, to limit rights to companies registered in India. This means, of course, that the Conference has abandoned the purpose of protecting companies registered in the United Kingdom from discrimination, legislative or administrative, and that it leaves it open for the Indian Legislature to confine branches of business, e.g. insurance or shipping, to companies registered in India. Nor would there be any difficulty in Indian legislation or administration being so employed as to prevent British companies acting through Indian subsidiary companies.

Sir P. Thakurdas's motives are avowed, and from his point of view perfectly natural; he desires to substitute Indian for British control in commerce; but why Lord Sankey should further his designs remains unexplained. There is no reason to suppose that the European community is prepared to acquiesce in the abandonment of what has been so far a

fundamental point in their case, and it is possible that in the rush of the last moments of the Conference Lord Sankey made a surrender the full extent of which he did not realize. It will, however, clearly have to be reconsidered,<sup>1</sup> and the worst of this necessity is that it will give rise to resentment in India. One might have hoped that by this time British politicians would have learned the unwisdom of committing themselves to promises without the fullest consideration of their implications.

### 23. MR. CHURCHILL AND INDIA

*To the Editor of THE SCOTSMAN, 5 October 1932.*

It is most unfortunate that Mr. Churchill insists on attempting the impossible in lieu of lending his aid to secure what might yet be obtained for the safety of British commerce in India. The first session of the Round Table Conference saw the adoption of the wise scheme of securing the interests of British traders and companies by a convention on the basis of reciprocity. At the second session the British Government yielded to the objections of Mr. Gandhi and his Bombay commercial auxiliaries and abandoned the basis of reciprocity, adopting instead the plan of a reservation in the Constitution, forbidding discrimination against British subjects ordinarily resident or carrying on trade in India on the score of race, descent, religion, or place of birth. Such a reservation is clearly of no real value, a fact which explains the acquiescence of the Bombay commercial community in its terms. It is not merely that any reservation, as a unilateral derogation from Indian rights, will be attacked and soon have to be removed, but its terms are such as to permit effective legal discrimination at the pleasure of Indian Legislatures. They have only to adopt domicile or length of residence<sup>2</sup> as a test when legislating, and

<sup>1</sup> See Joint Committee's *Report*, i. 207 ff. It is recognized that agreement alone would be satisfactory, but the unwise policy of safeguards is adopted.

<sup>2</sup> The Joint Committee has now provided against these contingencies, which were originally overlooked. See No. 26, *post*.

the reservation is completely nullified, and both these criteria as bases of legislation are accepted in the Dominions, and are open to no objection. Further, the British Government has expressly renounced protecting any British company registered in the United Kingdom, a concession inexplicable on any theory save inadvertence.

To render the clause of reservation effective would involve imposing such drastic restrictions on Indian legislative power that no Indian could be expected to accept it as compatible with British promises. Moreover, unilateral obligations are impossible of indefinite maintenance. The one safe course is to recur to the plan of the first session, which at the second session was still stoutly maintained by the representatives of British commerce in India, and favoured by such moderate statesmen as Sir Tej Bahadur Sapru. That asks for British traders and companies in India only what is conceded to Indian traders and companies here, competition without discrimination on a basis of reciprocity, a proposal which can be objected to only by those whose fixed aim is the elimination of British commerce from India.

#### 24. INDIAN SAFEGUARDS

*To the Editor of THE SCOTSMAN, 10 February 1933.*

Sir Samuel Hoare must have forgotten that Mr. Lloyd George and his Conservative colleagues gave us emphatic assurances as to the working of the Irish Free State Constitution. Doubtless they believed in them as truly as he does in his assurances as to India. But every one of them has proved false. Ireland presents us with the spectacle of a Free State, an independent kingdom, paying no part of our debt, repudiating all financial engagements, penalizing British imports, against which we can only wage a futile tariff war, to the amusement of our foreign critics and to the acute discomfort of our Dominions.

Sir Samuel Hoare is totally ignorant of the history of the



Dominions, or he would know that his safeguards are worthless, and will merely deceive those who trust in them. (1) The Governor-General and the Governors are to have important powers assured to them. In the infancy of responsible government the Governor of Canada had far wider authority. Metcalfe (1843-5) wore himself out in the effort to exercise it; Elgin surrendered at discretion. Imagine a Governor-General under a Labour Government here defying Ministers and the Legislature; his shrift would be short. (2) There is the British Army; Metcalfe had an army; New Zealand from 1863 used the forces which Britain paid for to carry out a native policy disapproved by Britain, and all the British Government could do was to withdraw the troops. In 1906-8 the strong British Government had to allow Natal to do as it pleased in mismanagement of native affairs—a question expressly reserved to the Governor, and even to maintain martial law, against the Governor's protests, and it did not dare even to withdraw the British forces from the Colony. Remember also that the British forces in India are paid for by India and not, as in Natal, by us. (3) Sir Samuel Hoare must know that the protection to be assured by the services recruited by the Secretary of State is worthless. We are pledged to wholesale Indianization; the services are already largely Indian, and that civil servants of Indian origin will defy Ministers and Parliament at the bidding of a Governor-General is a futile hope. And what of the practically wholly Indian subordinate services? (4) The British Government has already virtually admitted that it cannot safeguard effectively the interests of our trade in India. How does it propose to secure payment of the debts due to us? Is the British Army to collect from Indians taxes which the Ministry and Parliament declare should not be paid?

The Government has promised India what the Simon Report deemed unwise. It seeks to make us believe that it can produce effective safeguards. But really effective safeguards would mean virtually negating what has been pro-

mised. In practice I have no doubt the safeguards will be worthless, while their existence will destroy the possibility of winning by conciliation due regard for our economic and financial interests.

## 25. LORD IRWIN ON SAFEGUARDS IN INDIA

*To the Editor of THE SCOTSMAN, 14 March 1933.*

Lord Irwin, like Sir S. Hoare, is unhappily unfamiliar with the practice of responsible government, or he would not have committed himself to the hopeless doctrine that safeguards in India can be operated through the Indian Civil Service, whose European members are to be the 'linchpins' of Indian administration. A much greater authority, the Prime Minister, in August 1922, assured the Service that the Europeans were the 'steel frame' of the whole structure, but the assurance made little impression on the Service, which knew well that its position had been vitally changed and that not even Mr. Lloyd George could bind succeeding Governments.

Lord Irwin tells us that the existing system is to continue, contrary to the wishes of the majority of the relative committee of the first session of the Round Table Conference, but he must know that under that system it was intended that by 1939 there should be equality between Indians and Europeans in the Indian Civil Service, and that even moderate Indian opinion resents the slowness of Indianization. But the essential point is that all save a handful of these officers will serve under ministerial control, and that it is preposterous to demand from them that they shall be subject to the direct orders of the Governor when he sees fit to dissent from Ministers, and the latter decline to accept his views. Lord Irwin refers to the presence of British forces; but he cannot contemplate their use to eject Ministers from office and the installation in their place of civil servants.

There are two legitimate ways in which Governors can

intervene under responsible government, and the sooner that the restriction of their powers to these methods is recognized the better. (1) They may use their influence with Ministers, and, in the early days of the working of the system proposed, such influence may be of decisive value. (2) They may dismiss Ministers and choose others who will defend their action in the Legislature. This course depends on the composition of parties, but it is legitimate, and used wisely may be of real service. But the Governor must remember that, if he cannot obtain Ministers to support him, he must surrender. How little, however, the system is understood is shown by the rule that the Governor is not to be bound either to seek or to follow ministerial advice regarding the summoning, proroguing, or dissolution of the Legislature. A little reflection would have shown that such a position is an impossible one; the Governor on all these matters must act on ministerial advice; the element of discretion lies in his power to change Ministers, if he can secure others to support him.

It is now clear that in the case of the Centre it is hoped to construct as a condition of responsibility a Legislature which can be relied upon to afford conservative support to the Governor-General. It is permissible to doubt whether this procedure is wiser than that recommended by the Simon Commission. Schemes sometimes go wrong, as did the effort to construct the first Legislature of the Transvaal contemporaneously with the grant of responsible government, and the effort to use the Princes to defeat Indian Nationalism may in the long run pay neither the Princes nor the United Kingdom.

## 26. THE INDIAN CONSTITUTION: COMMERCIAL SAFEGUARDS

*To the Editor of THE SCOTSMAN, 18 March 1933.*

The provisions of Sections 122 and 123 of the Government proposals as to Indian powers of commercial discrimination

seem decidedly unfortunate alike for Indian and European commerce. Firstly, the terms of Section 122 are so widely framed that they appear to negate the right of India, recognized by the Imperial Conferences of 1917 and 1918, to adopt discriminatory measures in cases where, in British overseas territories, Indians suffer discrimination as opposed to Europeans. Secondly, the protection for persons domiciled in the United Kingdom and companies there registered is most unfortunately expressed. Such persons and subjects are to be exempt from disabilities as regards entry into, residence, and travel in British India, holding property, and carrying on business or trade, except in cases where like disabilities are imposed on Indian subjects and companies in the United Kingdom. It is clearly absurd to enact such a rule. In regard to the matters enumerated, what United Kingdom subjects and companies can claim is they shall not, on the score of their domicile or registration in the United Kingdom, be treated worse than are Indian subjects and companies. They cannot demand that they shall be exempted from disabilities to which Indians are subjected, because such disabilities may be non-existent under the quite different conditions of the United Kingdom. On the other hand, this absurd mode of enacting reciprocity has involved the jettisoning of any protection for United Kingdom subjects and companies in respect of taxation and of the carrying on of occupations and professions, matters of the highest importance.

What can be done by legislation now is simple; Section 122 can be extended to forbid discrimination between British subjects on the score of domicile in the United Kingdom or length of residence in India—a matter of great importance—and between companies registered in India and in the United Kingdom, and Section 123 can be dropped. Power to discriminate in some cases is admittedly necessary, and it should be accorded subject to the prior recommendation of the measure by the Governor-General or Governor and subsequent approval by the King in Council.

### 27. UNSATISFACTORY CHARACTER OF PROPOSED SAFEGUARDS

*To the Editor of THE SCOTSMAN, 28 March 1933.*

Sir Samuel Hoare deceives himself and the House of Commons when he claims that, on the resignation of a Ministry because the Governor overruled it, it would seldom be impossible for the Governor to secure an alternative Ministry. In fact, if the Governor's action was taken in the interest of European commerce, it would clearly be impossible for him to secure any Ministry prepared to undertake the utterly unpopular part of supporting the Governor. No Ministry can exist without the support of the Legislature, and a dissolution fought on the issue of protecting European commerce could merely end in complete disaster. It follows therefore that, if Ministers refuse to agree with the Governor on such a question, he must be prepared to take over the Government of the province in the teeth of the Legislature, and to call upon the Governor-General to allot to him troops to support his personal rule. No normal Governor in the face of these facts will venture to carry enthusiasm for European commercial interests to the point of dismissal of a Ministry.

A letter in your issue of to-day is fairly representative of the widespread hostility in India, shared by many moderate politicians, to European commercial interests. The existence of this feeling renders safeguards essential, but these must be defensible. All that can be asked for and that was contemplated by the first session of the Round Table Conference was that India should act as does the United Kingdom, and refrain from discriminating against persons domiciled in the United Kingdom or companies therein registered by reason of place of domicile or registration. This at present of course is the position established in India; what is desired is to prevent it being modified to the disadvantage of such persons and companies. But Sir Samuel Hoare has departed entirely from this reasonable and just demand. The clause (s. 123) which he

proposes takes these persons and companies out of the operation of the ordinary laws of India by forbidding the imposition on them of any disabilities not placed in the United Kingdom on persons domiciled, or companies registered, in India. This is to confer a new status hitherto unheard of and to create a new privileged class. The proposal is indefensible, and it can only be hoped that the Government will be able to assure us that all that it really intends to do is to forbid discrimination based on domicile of individuals or registration of companies in the United Kingdom. India at any time may have to legislate in ways for which no parallel exists in this country, and it cannot be compelled to exempt from the operation of necessary and salutary laws persons or companies domiciled or registered in the United Kingdom merely because no similar legislation is here requisite.<sup>1</sup>

## 28. SAFEGUARDS IN PART INADEQUATE, IN PART EXCESSIVE

(THE MORNING POST, 4 June 1933.)

The views here expressed claim no value, save in so far as they are based on long study of the working of Imperial institutions by one free from political ties and without material interests in India. I recognize fully that the declaration of 1917 and the claim by the British Government of membership of the League for India rendered inevitable the promise of Dominion status in 1929. But the question to be faced is whether the present governmental policy tends to achieve this end, or whether it may not, despite the benevolent intentions of its authors, rather frustrate it by creating anarchical chaos, ruinous to the intelligentsia, the mercantile wealth of India, the industrial workers and agriculturists, and British

<sup>1</sup> The provision of the Joint Select Committee's *Report*, i. 208 (s. 352) is probably too wide, and may encourage registration of companies in the United Kingdom to evade salutary regulations

investors and traders alike, and compelling recourse to one of the dictatorships so deplorably common to-day as a result of ignoring facts of human nature.

#### PROOF BY PRACTICE

The Simon Commission Report appeared to me, while bold, to offer the essential possibility of permitting India to prove by practice her capacity to make wise use of that most complex institution, responsible government. As I pointed out in 1919 and all experience proved, the Montagu-Chelmsford scheme had the fatal defect that it gave India no real responsibility, and neither its successes nor failures proved anything vital. I recognized the grave dangers of handing over justice and police to Indian control in view of the vast gulf between high caste Hindus and Untouchables, and between Hindu and Mohammedan; but I accept the argument that in the ultimate issue, if these subjects are withheld, responsible government does not exist. But the Simon scheme provided in the central government the necessary safeguard, with real power to secure the welfare of any Province, if responsibility proved too onerous a burden on Ministers, the difficulty of whose tasks no one should fail to emphasize.

#### 'ADEQUATE SUBSTITUTE'

The British Government, including Sir J. Simon, have assured us that what they offer in the White Paper is an adequate substitute for the proposals of the Simon scheme.

(1) They ask us to believe that they can create a permanently Conservative central Legislature and Government, which will be an effective security for British interests, by enlisting the aid of the States. The States, menaced by demands from their own subjects for the privileges enjoyed by their fellow-Indians in British India, are invited, by sacrifice of some measure of more or less nominal authority as regards issues to be made federal, to secure autonomy in local matters, with assurance of full British military protection against efforts

to overthrow their autocracy. Haidarabad, the key State, may even hope for the retrocession in some form of Berar. But, if the States consent to come in in sufficient strength, will they really be able to play the part demanded? Can they, beside provinces with responsible government, remain autocratic homes of Conservatism and supports of British interests? Or will they not take the easier course of making terms with their Indian colleagues on the basis of removal of British intervention? No one really knows, and the whole proposal is a leap in the dark, whose results may be wholly unlike anything expected in any quarter.

(2) In addition, the Governor-General and the Governors are to have wide personal powers of action, to be enforced in the last instance by the British Army. Here we are on firmer ground, and the overwhelming weight of authority is against the possibility of effective use of such powers. There is not the slightest doubt in the mind of any clear thinker that either the safeguards must remain unused or they are destructive of self-government. You cannot give a Governor-General a voice in finance without imposing on him the real responsibility. And the same thing applies to the maintenance of peace and tranquillity. If the real intention of the Government is to leave the power to the representatives of the Crown, then it is absurd to proceed with the elimination of European preponderance from the key services. Without effective control of these services, the army would be utterly useless. If the real intention is to give power to Ministers, then abandon the pretext of safeguards and the idle search by the Joint Select Committee for further paper securities, which must either be worthless or destructive of the alleged aims of the Ministry.

#### THE CHOICE

Our present governmental policy seems to seek to meet Indian aspirations by assurances that safeguards are merely formal, and to obviate our anxieties by assurances that the



safeguards are real. Both views cannot be correct. In reality, the choice should lie between two policies: either we should trust Ministers wholeheartedly in the Centre and Provinces alike, or we should give Ministers full provincial authority under the guidance of a Central Government responsible to Parliament. It may now be too late to try the latter course, though of this no proof is adduced. But either is surely to be preferred to a policy which must certainly deeply disappoint either Indian political aspirations, or the British claimants of safeguards, or even more probably both alike. There are definite limits to the possibilities of our alleged national habit of muddling through difficulties.

## 29. PARADOXES OF THE INDIAN CONSTITUTION

*To the Editor of THE SCOTSMAN, 7 April 1933.*

Ceylon, I fear, furnishes a conclusive answer to Lord Reading's hope that safeguards will work, and that Indian politicians will, under the White Book Constitution, settle down to solution of economic and social problems in lieu of political agitation. The Governor of Ceylon has enormous powers, British troops and a Civil Service at his control; the Ceylonese have rejected Imperial Preference, and instead of tackling their many internal problems—one of the grounds alleged for the grant of the new Constitution—have concentrated on demanding the withdrawal of independent authority from the Governor, including all control over finance. In India the moderate politicians, who are expected to work the Constitution, have united in denouncing the safeguards, and the definite pledge of ultimate Dominion status given by Lord Irwin on October 31, 1929, precludes the slightest chance of India abandoning political agitation until the goal is attained.

The Government's reliance is clearly placed on using the Princes to create a Conservative Federal Government to counter political agitation in the provinces. Many Princes, however, as the late ruler of Nawanagar was arguing when

interrupted by Lord Willingdon, disbelieve in the possibility of the Governor-General and Governors operating the safeguards, a view shared by Lords Zetland and Lloyd from practical experience. They demand effective securities if they are to federate, but this runs counter to the one thing that can be asserted with absolute confidence of the British system of responsible government—namely, that it is absolutely inconsistent with safeguards other than those which can be made effective by actions in the Courts, and to give the Princes this form of safeguard has so far been held impracticable. On the other hand, the suggestion of an irremovable but Indian Ministry at the centre is a negation of responsible government there.

It is paradoxical that a new Constitution should be drafted for India when we dare not permit Congress to meet and express its views, but Parliament has allowed the promise of 1929 to stand, Labour is pledged to it, and it must be honoured as any other course of action is practically impossible. But it may be hoped that the Government will cease to delude us with the assurance of the effectiveness of its executive safeguards, and will instead devise with the aid of Indian opinion such safeguards, to be operated by the Courts, as are practicable, and for the rest, by refusing to impose on the Governor-General or Governors duties they cannot perform, compel Indian politicians to accept full responsibility for the good government of their country, and deprive them of the facile expedient of throwing the blame for their failures on the representative of the King, and of protesting against British interference.

### 30. MR. BALDWIN'S INDIAN POLICY

*To the Editor of THE SCOTSMAN, 13 May 1933.*

The statements of Mr. Baldwin and Sir Samuel Hoare, reported to-day, make perfectly clear the position of the Government regarding Indian policy.

(1) By earlier declarations and his obligations to the Prime Minister the Conservative leader is pledged to the policy of the White Paper, no doubt in large measure because the policy of the Labour party as lately reaffirmed is one of complete responsible government for India.

(2) It is hoped to minimize the effects of concession in two ways. The first of the methods is the use of Indian autocracy to check Indian democracy. The Indian Princes who refuse to be constitutional sovereigns are to supply to the Central Legislature the necessary numbers to secure a really Conservative régime at the centre, as opposed to the democratic régime promised to the Provinces. The Princes in return are to be assured of the right to maintain their autocratic rule; Haidarabad, the most vital state to win over, is to be assured British military protection against unrest, while the possibility of British intervention in internal affairs will be excluded by the necessity of relying on the aid of Haidarabad in central government; possibly Berar may be restored.<sup>1</sup> The attempt thus to temper democracy and secure a permanent Conservative majority is ingenious; for various reasons its success is dubious.

(3) The second method is the scheme of safeguards in the White Paper. The opinion of those who have expert knowledge, and who are not in the service of the Government of India at the present time, confirms the prior belief that the safeguards will not work under a Conservative régime here, and that under a Labour régime the British Government cannot consent to work them. Their one purpose seems, therefore, to be to facilitate acceptance by the rank and file of Conservatives of the governmental plan as a safe one. In all probability better statesmanship would abandon the safeguards as misleading and a source of constant irritation, and appeal to Indians to make wise use of the powers which, in fact, they will have.

<sup>1</sup> This has been avoided, Joint Committee's *Report*, i. 36. The Berars will be administered with the Central Provinces as a single province. On the other hand, Mysore appears to be assured of the cession of Bangalore, and, like other States, of concessions as regards tribute payments.

(4) Mr. Baldwin seems to recognize that his safeguards will do nothing for British trade. The only real possibility of success in protecting that trade lay in the policy of a convention based on reciprocity which the first session of the Round Table Conference accepted, but which the Government most unwisely abandoned in favour of its present proposal, of which I have seen no attempt at a reasoned defence, and which certainly cannot stand. Even yet the Government might do something for British trade if it would offer to drop its paper safeguards in return for agreement on reciprocity.

(5) Sir S. Hoare seems to have forgotten that since the early months of 1931 British credit has been placed on a  $3\frac{1}{2}$  per cent. basis, there is now general agreement that the prices of primary products must be raised, and that bimetallism has once more come within the field of discussion. These considerations, I suspect, have far more to do with the success of the latest Indian loan than confidence in the policy of the present Government.

(6) In view of the present conditions of feeling both in India and in this country it may well be that the only course open is to surrender British control of India. What, however, is to be regretted is that Sir S. Hoare persists in denying that his policy is one of surrender, and that Mr. Churchill is censured for stating what is clearly the true state of facts. But we had the same assurances regarding the Irish Free State and from politicians of higher rank.

### 31. THE DANGER OF EXECUTIVE DISCRIMINATION

*To the Editor of THE SCOTSMAN, 26 June 1933.*

Sir John Simon, in his speech on Saturday, enunciated a doctrine which seems unimpeachable: 'I think an essential part of British liberty is that people in a proper case should be able to challenge the action of an executive, and get our Judges to decide whether it is right or wrong.'

Yet the British Government in the White Paper has declined to give the Courts any control over discrimination in matters commercial practised by executive authorities in India without statutory authority. It concedes to the Courts the right to declare invalid legislative discrimination, but all that it is willing to do is to make commercial discrimination one of the matters in which the Governors are to have special responsibility. Nothing can be more unsatisfactory. Expert opinion is overwhelmingly in favour of the views (1) that administrative discrimination is as much, probably more, to be feared than legislative discrimination, which must run the gauntlet of full publicity and receive the assent of the representative of the Crown; and (2) that a Governor cannot effectively afford protection, for his business is to avoid crises, and he cannot be expected to dismiss a Ministry because it discriminates against a European firm.

It is clearly incumbent on the Government to accept the spirit of Sir John Simon's doctrine and to give the Courts the right to pronounce on executive no less than on legislative discrimination.<sup>1</sup> It cannot be morally justifiable to do by

<sup>1</sup> The following is a draft of clauses suitable to be inserted in the Constitution Act to give effect to the view suggested in the above letter, which was then drawn up by me and communicated to certain persons interested:

(1) Save as hereinafter expressly provided, it shall not be lawful for any legislature in British India, while legislating in respect of migration into, or residence or travel in, any part of British India, the acquisition, holding, and transfer of property of any kind; the engaging in and carrying on of any form of occupation, profession, trade or business, or any matters ancillary thereto, such as the employment of managers, servants, or agents, or taxation, to impose, or to sanction the imposition of, any disability or discrimination upon—

(a) any subject of His Majesty, domiciled in any part of British India or of the United Kingdom, by reason of race, descent, colour, caste, place of birth or domicile or residence, or continuity or duration of residence in British India: or

(b) any corporate body, formed under the laws of any part of British India or the United Kingdom by reason of the place of incorporation or of the race, descent, colour, religion, caste, place of birth or domicile or residence, or continuity or duration of residence in British India, of all or any of the members, officers, servants or agents of the said corporate body.

(2) If the Governor-General considers it essential in the interests of the good government of British India or of any part thereof, or the Governor of a province with the assent of the Governor-General, considers it essential in the interest of the good government of that province or any part thereof, that specified classes of British subjects or of corporate bodies should be subjected, in respect of any of the matters above enumerated, to any disabilities or discriminations by reason of any of the

executive action what it is illegal to do by legislation, and to declare legislative discrimination illegal, while leaving executive discrimination a matter of discretion, is to offer European commerce an illusory protection. No valid reason for the attitude of the Government has been or can be adduced, and it will be deplorable if the Joint Committee does not overrule Sir Samuel Hoare and accord to European commerce the access to the Courts which is necessary to afford it any real protection.

### 32. 'DOMINION STATUS' FOR INDIA

#### WHAT DOES IT MEAN?

*To the Editor of THE MORNING POST, 4 September 1933.*

There is an item in the policy of the United Ireland Party as outlined on Saturday which is extremely relevant in conjunctions above enumerated, he may recommend such legislation to the Indian legislature or to the legislature of the province

Such legislation, whether passed in the form recommended or with alterations, shall be reserved for the signification of His Majesty's pleasure thereon, and shall lapse and be of no effect unless assented to by His Majesty in Council within a year from the date of reservations.

Provided that the Governor-General, if satisfied that there is urgent necessity in the interests of the tranquillity of British India or any part thereof, that such legislation should take immediate effect, may assent to a Bill of the federal legislature, and may authorize the Governor to assent to a Bill of a provincial legislature, but an Act so assented to shall cease to have operation six months after the date of such assent unless specially confirmed before the expiration of that period by His Majesty in Council.

Every Bill so reserved, and every Act so assented to, shall be laid before both Houses of Parliament, and His Majesty's assent or confirmation shall not be accorded if, within thirty days after the Bill or Act has been so laid, either House shall address His Majesty praying that such assent or confirmation shall be withheld.

3. Save in so far as may be expressly authorized by legislation passed in accordance with the provisions of clause (2) and duly assented to or confirmed by His Majesty in Council, no executive or administrative authority in British India shall, in the exercise of the powers by statute or otherwise vested in it, impose by bye-law, regulation, rule, order or otherwise, any disability or discrimination which under clause (1) may not be imposed by the legislatures in British India

4. Any disability or discrimination which may be imposed contrary to the terms of clauses (1) and (3) shall be absolutely null and void

Provided that, when legislative provision is made for assistance to any form of industry by the grant of a bounty or subsidy, it shall be lawful in the case of companies which are not, at the time when such provision is made, engaged in trade in India, to restrict the eligibility for, or to give preferential treatment in respect of applications for, such bounty or subsidy to companies which comply with one or more of the following conditions, namely. (1) that the company shall be incorporated under the laws of British India, (2) that the company shall undertake to provide reasonable facilities for the training of persons of Indian race in that form of industry; and (3) that not less than one-third of the directors shall be persons of Indian race or domicile.

nexion with Lord Willingdon's insistence on Dominion status as the goal of Indian constitutional reform. The new party is formed *inter alia* 'to maintain Ireland's right to decide whether or not to remain a member of the British Commonwealth'.

This means, of course, that Mr. Cosgrave, Mr. MacDermot, and General O'Duffy accept Mr. de Valera's doctrine that it is an inherent right of any Dominion to secede at pleasure.

The same doctrine, of course, is held by General Hertzog, and by the Parliament of the Union of South Africa, which formally affirmed it when accepting the Statute of Westminster in 1931. It is therefore the official doctrine of two Dominions. Moreover, the views of these Dominions rest upon important British authority. It will be remembered that, when Mr. Bonar Law resisted the grant of Dominion status to Ireland while defending the Government of Ireland Bill of 1920, he used as a conclusive argument the fact that Dominion status involved the right of secession.

This admission is not conclusive, but the disquieting fact is that no British Minister has consented since 1926 to affirm that Dominion status does not include the right of secession. To me it appears that the preamble to the Statute of Westminster should be read as a distinct negation of the existence of the right, but the fact that the Union of South Africa repudiated this interpretation without any protest on the part of the British Government has left the issue in hopeless doubt.

Surely, in the interests of India and the United Kingdom alike, we are entitled to ask that the British Government will consent to state whether or not the Dominion status it promises India includes the right to secede. The point is very far from academic; it is a matter of dealing fairly with the British and the Indian publics alike.

### 33. THE RULE OF LAW IN INDIA

*To the Editor of THE SCOTSMAN, 21 October 1933.*

English lawyers will hardly accept the view that Magna Carta is now dead, or that it is irrelevant to refer to it in

regard to the position of the European community in India. In point of fact, the famous chapter *Nullus liber homo* is an essential part of English law at the present day; it is a statutory affirmation, not indeed of trial by jury, but of the rule of law, and it is incredible that it should be repealed. The extent and character of the security against arbitrary action of the executive Government enjoyed under it may vary from time to time under legal enactment, as during the régime of the Defence of the Realm Act, but the principle is essential.

The application of the same principle to India is one of the most important contributions made by the British rule to Indian welfare. Whatever merits Hindu or Mohammedan rule possessed, they did not include the idea of safeguarding the subject against the administration or its officers. Since the inauguration of the reforms criminal procedure in India has been extensively remodelled with general assent to secure both for Indians and Europeans confidence in the fair administration of justice. That the position of Europeans under the existing system is in any way unduly favourable can hardly seriously be contended, and it appears to me that the European community is fully entitled to ask that the new Constitution shall include the provision that the *status quo* shall be altered only by Acts which must be reserved for the consideration of the King in Council. This, fortunately, is a case in which legal protection in the Constitution might be effective in securing that no rash alterations should be attempted and that any change should be generally acceptable.

### 34. INDIAN PENSIONS

*To the Editor of THE SCOTSMAN, 26 October 1933.*

The India Defence League's demand that the British Government must continue to guarantee the payment of all Indian pensions both present and future is, I fear, hardly defensible.

If it means that the British Government is to compel



payment from Indian funds, the demand may well prove impossible to carry out. Indian taxable capacity is limited; the British Government by creating federation admittedly adds largely to the cost of government, 'nation-building services' will make large demands on the revenue, defence is deplorably costly, and apart from repudiation a British Government might find it necessary to consent to reductions in pension rates as an alternative to default on debt charges or neglect of defence.

If it means that the British Government shall give a guarantee that pensions on failure of payment in full by India shall be defrayed from British funds, then a distinction must clearly be made. Those officers who entered the Indian services prior to the Government of India Act, 1919, may justly argue that they relied and had every right to rely on the continued management by the British Government of Indian finance, and that they are entitled to look to Parliament to provide funds, if India fails. But this contention cannot apply to those officers who entered Indian services since the inauguration of the reforms. They must have known that the position was vitally changed; in fact, the difficulty of securing satisfactory recruitment for the Indian Civil Service for some years after the reforms proves conclusively that the change was fully understood, and the British Government has meticulously refrained from any suggestion that it would guarantee pensions, despite its efforts by improving salaries and otherwise to attract recruits. If the Defence League confines its claims to the guarantee of pensions for officers who entered the services before the reforms, its demand will rest on overwhelming grounds of fairness and good faith, and it will have the additional advantage that it will not impose an impossible burden on the gravely overtaxed British taxpayer.<sup>1</sup>

<sup>1</sup> The Joint Committee's *Report*, 1. 190, 191, provides no guarantee for any pensions, and it is significant that it contemplates with satisfaction the arrangements proposed for the conversion of rupee credits in respect of family pension funds into sterling funds if desired by subscribers and beneficiaries.

## 35. INDIAN PENSIONS

*To the Editor of THE SCOTSMAN, 31 October 1933.*

I note with some amusement Dr. Buchan's objection to a Scottish Parliament on the score of the additional cost involved. Yet Dr. Buchan is, I believe, a loyal supporter of a Government which is granting Federal Government to India despite the fact that there must be caused such increases in the cost of government there as will endanger gravely the capacity of India to meet her debt charges, pension payments, and the cost of her vital defence. Dr. Buchan, I must assume, concurs also in the proposal to separate Sind from Bombay, though I doubt whether a Parliament whose members must necessarily make London their head-quarters is any better qualified to deal with Scots problems than the Legislature of Bombay is with those of Sind.

As regards pensions, it is idle to cite at second hand a fragment from the preamble of the Act of 1919. All those who were connected in any way with the passing of that measure, or followed the contemporary proceedings in Parliament, fully recognized that the Act meant the handing over to India of the control of her destinies. So clearly was this realized that recruitment for the Indian Civil Service suffered a severe check, and the Government only secured a resumption of interest by conceding increases of pay and better pension terms. But it absolutely declined to give any undertaking that the British Exchequer would bear the cost of pensions. We are assured also by Sir S. Hoare that the policy of federation and responsible government has the approval of the Services. Whether this be true or not, it is plain that men who entered after the Act of 1919 have not the slightest moral right to ask the overburdened taxpayer of this country to provide for them, but they must look to India.

The position is quite different as regards those officers who entered the Services at a time when even so advanced a Liberal as Lord Morley scoffed at the idea of parliamentary

government for India. They went to India as the instruments of British rule, and Mr. Montagu's reform scheme was imposed on them without their assent. That the British Government should guarantee them the pensions which they earned is patently fair, and it is a great pity that the India Defence League should, as so often, spoil a good cause by a reckless extension of claims.

### 36. ADMINISTRATIVE DISCRIMINATION

*To the Editor of THE SCOTSMAN, 10 November 1933.*

From Sir S. Hoare's evidence regarding commercial discrimination, it is clear that the Government has decided to persist in the wholly unsatisfactory policy of refusing any legal protection against administrative discrimination. The duty of providing against such discrimination is to be imposed on the Governor-General and Governors, a plan which may safely be said to ensure the minimum of effective protection and the maximum of friction when the Governor-General or Governor attempts to act. It is significant that no reasoned defence of this policy has been attempted, and it is clear that Sir S. Hoare remains quite unaware that colonial experience early proved that Governors cannot intervene with success in this mode.

Secondly, it is deplorable that the Government should have decided that India may indeed refuse entry to a Dominion British subject, but that if it does not take that step, or if such a subject is now resident, it cannot impose on him any disability in respect of profession, trade, calling, or the holding of public office. As the Dominions have unfettered authority to deal as they please with Indians, this denial of reciprocity runs counter to the spirit of the Imperial Conference resolution of 1917, and is clearly indefensible. It deprives India of the power to bargain with the Dominions, and is wholly inconsistent with the advance of India to Dominion status. On what grounds this policy has been adopted does not appear.

Dominion statesmen certainly have been careful not publicly to advance the claim now made for Dominion subjects.

Thirdly, while some attempt has been made to render more coherent the protection against legislative discrimination, though the proposals still are in detail obscure, the error has been made of opening no means by which discrimination in cases which have the approval of the British Government may legally be permitted. Sir S. Hoare now realizes that in some special cases there must be discrimination, and for these he makes provision, but in any instance which does not fall within these instances, action which has the approval of India and the United Kingdom will be open to challenge in the Courts, and the only remedy will be amendment of the Constitution. Surely common sense shows that extreme rigidity in a new Constitution is impossible to defend.

### 37. INDIAN FINANCIAL SAFEGUARDS

*To the Editor of THE SCOTSMAN, 14 November 1933.*

The last paragraph in Sir Samuel Hoare's letter on safeguards raises an issue which far transcends that of pensions in importance. It seems clearly to suggest that those who have invested money in Indian governmental stocks in fact and in law look only to India for the security of their loans.

This I believe to be wholly contrary to facts. The average investor has certainly assumed that the British Government was ultimately responsible for securing payment of interest and repayment of capital, and his assumption has been based *inter alia* on the absolute distinction which has always been made between the Colonies and Dominions and India in the matter of loans. (1) Loans for the former have never been raised by the Secretary of State, but by the local Government. In the case of India, loans are raised by the Secretary of State for India in Council, who by statute was made responsible for the whole Government of India, and who is an integral part of the British Government. (2) The Secretary of State

for India in Council has always, as successor to the East India Company, been liable to suit in the English Courts in respect of commercial transactions, and still remains liable. No action lies against the Secretary of State for the Colonies. (3) The prospectuses of Indian loans contain no warning that Indian funds alone are liable for the service and repayment of the loan. In the case of the Dominions and Colonies, a distinct warning is normally included of the statutory rule of the Colonial Stock Act, 1877, to this effect. In the former case, the document which is evidence of title of the loan likewise contains no such warning, in the latter case it does. Dividend warrants for Indian loans are silent, while those on the other loans repeat the warning.

If we are to understand that Sir S. Hoare is advised that we must look only to India to find interest and repay capital under the new régime, then a serious burden is imposed on all trustees who have invested the funds of beneficiaries in Indian stocks, for they are bound to consider whether they should not transfer to other stocks. It is not primarily a question of repudiation, though New South Wales tried to repudiate, and Newfoundland had to be bribed by the British Government to refrain from taking that step. But the new system of government in India will admittedly increase largely the cost of government, as will the needs of the social services there, which long have been starved; many good judges deny that India can bear these extra charges, together with the burden of defence, pensions, and overseas debt. Even a Governor-General exercising autocratic powers will find it impossible to collect by the use of the British forces taxes which the peasantry will find it impossible to pay, and some scaling down, such as has been carried out in Australia and New Zealand in breach of contract, will be necessary.

But at least let us be told by Sir S. Hoare how matters stand, so that investors, whether for themselves or as trustees, may know clearly what risks they run.<sup>1</sup>

<sup>1</sup> Nothing has been done in this regard; see *Morning Post*, Dec. 4, 1934.

## 38. MALTA, NEWFOUNDLAND, AND INDIA

*To the Editor of THE SCOTSMAN, 22 November 1933.*

Responsible government in Malta has had to be suspended because the most explicit constitutional provisions were being effectively evaded by the Ministry and its measures were threatening financial stability. Newfoundland, after seventy-seven years of responsible government, is in such a condition that the British Government can rescue it only at the cost of a heavy payment by the overburdened British taxpayer, partial default in the Dominion's obligations, and the surrender for an indefinite period of responsible government in favour of a form of Commission government of which one may hope but hardly expect the best.

In the face of these facts it is surely necessary that drastic changes should be made in the financial safeguards of the White Paper. Indian finance has, under the Montagu-Chelmsford scheme, been jealously safeguarded in the provinces and the centre alike from any danger of ministerial errors. The White Paper actually negatives the imposition on the Governors of the provinces of any special responsibility for the financial stability of the province, and merely gives to the Governor-General a special responsibility for the safeguarding of the financial stability and credit of the federation, and permits him the aid of a Financial Adviser, independent of Ministers. It should now be perfectly clear that the Governors must be given responsibility and the powers of enforcing it with expert aid,<sup>1</sup> and that the authority of the Governor-General will have to be extended and reinforced. Any other course will merely lead to disaster due to financial chaos, and the British taxpayer, who is being made to pay for the grave errors of Newfoundland, is entitled to expect that the Government shall not ensure that the burden of paying for India shall be added to his task. That such control is a grave

<sup>1</sup> The Joint Committee's *Report*, i. 47, negatives any grant of power to the Governor.

restriction of responsible government is undeniable, but the Government is fully entitled and ought to say that, with the spectacle of the *débâcle* in Malta and Newfoundland before it, it must insist on exercising its indubitable right to launch self-government in India under conditions which will permit of a steady extension of its scope as opposed to bringing about its rapid disintegration in financial disaster.

### 39. THE FUTURE OF INDIA

*To the Editor of THE SCOTSMAN, 27 October 1934.*

Sir John Gilmour is added to the number of those who urge acceptance of the governmental policy regarding India on the ground that 'you cannot force the great Indian people to trade with us at the point of the bayonet'. Put bluntly, that means that, despite the present British control of the armed forces in India and of the enforcement of law and order, fear of an Indian boycott justifies the surrender of authority in respect of legislation and the maintenance of law and order to Indian Ministries. But what will happen if these Ministries demand the abrogation of the safeguards which it is proposed to insert in the Constitution, and approve of the use of the weapon of boycott to force the hands of the British Government? Does Sir John Gilmour not realize that, if we cannot under present conditions prevent a boycott on a scale ruinous to British trade, we shall be utterly helpless when the enforcement of law is in the hands of Ministries which approve the policy of bringing pressure to bear on British trade? If the British Government can be compelled by fear of boycott to make the essential surrenders in the White Paper proposals, how can it be expected to resist a far more serious situation in the interest of the retention of safeguards which are of minimal consequence in comparison with the surrender now intended to be made?

Our Ministers presumably share the common error that they are making a mere experiment in the extension of self-

government in India, which can be cancelled if it fails in practice. No doubt the Simon proposals offered such an experiment, but they are definitely rejected. The present project must end definitively in Indian autonomy, whether in independence or in nominal connexion with the Crown, as in the case of the Union of South Africa. That is a perfectly defensible policy, but it ought to be frankly avowed, not obscured by talk of safeguards.

We may be told that Indian politicians will so appreciate the concession of self-government that they will gladly facilitate the entry of British manufactures. The argument ignores the essential fact that the average Indian politician regards the proposed concessions as overdue, and as vitiated by the attempt to impose safeguards. Further, it ignores the equally essential fact that gratitude is unknown in political life. Sir Henry Campbell-Bannerman's grant of responsible government to the Transvaal was rewarded forthwith by the colony insisting on exclusion of Indians at the cost of embittering relations between Britain and India, and the Liberal Government, for all its strength, dared not refuse to sanction the Bill, despite the express safeguard inserted in the Constitution for the purpose of preventing such legislation. Similarly the Union has shown its appreciation of the generous aid afforded in creating the Union in 1909 by securing through the operation of bilingualism the virtual reservation of a career in the Civil Service to Afrikaans-speaking subjects. It may be hoped, though it can hardly be expected, that this precedent has not been overlooked by the Select Committee.<sup>1</sup>

The only real safeguard for British trade is its intrinsic value to the people of India and the power of the British Government to retaliate against Indian exports. Even those who desire to insert them probably know that the safeguards suggested in the White Paper are illusory, and they err in forgetting that they may irritate while they cannot protect.

<sup>1</sup> Its *Report*, i. 219, 220, has no useful provision to suggest.



## 40. THE REPORT OF THE JOINT SELECT COMMITTEE

*To the Editor of THE SCOTSMAN, 22 November 1934.*

Of the further safeguards proposed by the Joint Select Committee for the Indian Constitution, surely the least defensible is the responsibility proposed to be placed on the Governor-General to prevent the imposition of penal tariffs on goods imported from the United Kingdom. The burden imposed on the Governor-General would be most unfair; *ex hypothesi* he would have to set up his own judgement against the deliberate decision of his Ministers and of the two Houses of the Legislature, involving necessarily an overwhelming weight of Indian opinion. We have been repeatedly warned of the danger of the weapon of boycott, and the inevitable and indeed justifiable answer to the Governor-General's action would be a boycott supported by the sympathy of Ministers and Governments throughout India, which would result in early submission by the British Government. The only sound method of treating this matter is the plan, originally contemplated, of agreement between India and the United Kingdom for arbitration on alleged penal tariffs. If that is impossible, then the matter should be left to be dealt with by the ordinary mode of retaliatory action as between two equal Governments. The Governor-General's position is sufficiently difficult in any case without placing on him so invidious a task, and one certain to be represented as alining him with the adversaries of Indian economic autonomy.

It is equally impossible to defend the proposal to fill additional seats in the Federal Legislature if less than 90 per cent. of the States accept federation. The suggestion reveals consciousness by the Committee of the utterly artificial character of the system by which the autocratic Governments of the States are to be relied upon to provide in the Legislature means of nullifying the wishes of the elected representatives

of British India. It is impossible to justify the view that responsible government can be safely conceded in provincial matters, but that in federal matters not only must dyarchy be maintained, but in the transferred sphere the votes of elected members must be counterbalanced by those of representatives of States in which the ultimate power rests entirely in the ruler free from constitutional restrictions.

It is difficult to understand how it can be believed that the Governors in the Provinces can secure the secrecy of records of the Intelligence Department relating to terrorism, and their added duties regarding terrorism and the police are simply incompatible with the idea of responsible government in the Provinces. The safeguards for commerce also remain unreal. Their authors are probably aware that it is merely a matter of legal ingenuity to nullify them in administration, and that the Governors and the Governor-General will in practice be unable to prevent this happening. Moreover, the strength of Indian politicians will be consistently and naturally directed against measures which will be represented as unjust efforts to enforce upon India limitations which no Dominion has ever been subjected to.<sup>1</sup>

It is very probable that in view of what has happened a policy of surrender of authority in British India is both inevitable and desirable. But the Committee and the Government have adopted in lieu of frank partnership in the Empire a system of apparent concessions subject to safeguards, which if put into operation negate responsible government and whose mere presence is a source of irritation to Indian opinion. The Committee seems to have forgotten that Southern Rhodesia has already demanded the removal of the restrictions on autonomy subject to which responsible government was definitely conceded, and which were, when imposed, generally regarded as fair and inevitable.

<sup>1</sup> All organized expression of Indian opinion has condemned the safeguards. 'It is true that in India a chorus of disapproval has been raised against the Committee's recommendations' (Sir S. Hoare, Jan. 1, 1935).

#### 41. DRAFT COMMERCIAL AGREEMENT BETWEEN THE GOVERNMENTS OF THE UNITED KINGDOM AND OF BRITISH INDIA

5 September 1931.<sup>1</sup>

Whereas the Indian Round Table Conference at their meeting of January 19, 1931, recorded general agreement in the principle that there should be no discrimination between the rights of the British mercantile community, firms, and companies, trading in India and the rights of Indian-born subjects, and that an appropriate convention based on reciprocity should be entered into for the purpose of regulating these rights; and

Whereas the terms of an Agreement in accordance with this principle have received the approval of the Round Table Conference at their meeting of

The Government of the United Kingdom and the Government of British India, desiring to consolidate and extend the close commercial relations already existing between their territories on the basis of complete equality and reciprocity, and the absence of any discrimination on the ground of race, place of birth, or domicile, have agreed as follows:

##### *Article I.*

In this Agreement the term 'subjects' in its application to the United Kingdom means (1) all British subjects domiciled in any part of the United Kingdom, and (2) limited liability companies, partnerships, and associations of all kinds organized in accordance with the laws in force in the United Kingdom, and in its application to British India means (1) all British subjects domiciled in any part of British India, and (2) limited liability companies, partnerships, and associations of all kinds organized in accordance with the laws in force in British India.

<sup>1</sup> See No. 19, *ante*.

The term 'vessels' in its application to the United Kingdom and the term 'British vessels' denote vessels registered in the United Kingdom, and the term 'Indian vessels' denotes vessels registered in British India.

*Article II.*

The subjects of either party shall enjoy unequivocally and unconditionally in every respect in the territories of the other party treatment not less favourable than that accorded to the subjects of that party. This provision shall extend to all matters of agriculture, industry, commerce, and navigation; of entrance, residence, settlement, and travel; of the acquisition and disposal of property; of the exercise of professions and occupations; and of the acquisition and carrying on and disposal of any description of business. No derogation, direct or indirect, from this principle shall be made, except as is specifically permitted under Articles XIII, XIV, and XVII of this Agreement.

Without prejudice to the general provision of Article II, the contracting parties have further agreed as follows:

*Article III.*

There shall be between the territories of the contracting parties reciprocal and unrestricted freedom of commerce and navigation.

The subjects of either party, upon conforming themselves to the laws and regulations applicable generally to the subjects of the other, shall have liberty, freely and securely to come, with their vessels and cargoes, to all places and ports in the territories of the other to which subjects of that party are or may be permitted to come, and shall enjoy the same rights, privileges, liberties, favours, immunities, and exemptions in matters of commerce and navigation as are or may be enjoyed by subjects of that party.

*Article IV.*

Any article produced, or manufactured, in the territories of

either of the contracting parties, on importation into the territories of the other, shall not be subjected to other or higher duties or charges than those paid on the like articles produced, or manufactured, in any other country. With regard to customs formalities any articles produced, or manufactured, in the territories of either party, when imported into the territories of the other party, shall not be subjected to any treatment less favourable than that accorded to like articles produced, or manufactured, in any other country.

*Article V.*

No articles on exportation from the territories of either of the contracting parties to the territories of the other shall be subjected to other or higher duties or charges than those levied on the like articles on exportation to any other country.

*Article VI.*

The contracting parties undertake not to impede the mutual traffic through the imposition of any prohibitions or special restrictions on their imports or exports.

Exceptions from this rule, if applied at the same time and in the same way to all countries where similar conditions prevail, can be made in the following cases: (1) with regard to public security; (2) with regard to traffic in arms, ammunition, and war material, or in exceptional circumstances all other military supplies; (3) for the protection of public health, or for the protection of animals or plants against disease, insects, and harmful parasites; (4) in respect of goods which are or may be objects of a state monopoly from time to time in the territories of either party, and in respect of the extension to goods from any country whatsoever of all other prohibitions or restrictions which are or may be from time to time imposed by the internal legislation of either party upon the production, sale, forwarding, or consumption of goods of the same kind produced within its own territories; and (5) in respect of the export of national treasures of artistic, historic, or archaeological value.

*Article VII.*

The subjects of each of the contracting parties shall enjoy in the territories of the other exemption from all transit duties, and a perfect equality with the subjects of the other in all that relates to warehousing facilities and drawbacks.

*Article VIII.*

The contracting parties shall permit the importation or exportation of all merchandise which may be legally imported or exported, and also the carriage of passengers and their baggage and effects from or to their respective territories upon British or Indian vessels; and British or Indian vessels, their cargoes and passengers, shall enjoy the same privileges as, and shall not be subjected to any other or higher duties or charges than, Indian or British vessels and their cargoes and passengers.

It is agreed that the foregoing provisions preclude either of the contracting parties from imposing differential flag duties or charges on goods or passengers carried in vessels of the other, and that no regulations relating to seagoing vessels at any time in force in the United Kingdom or British India shall apply more favourably to vessels registered in the United Kingdom or British India, or to the vessels of any other country, than they apply to any vessels registered in British India or the United Kingdom.

The contracting parties further agree, in regard to facilities for international railway traffic and to the rates and conditions of their application, to refrain from all discrimination of an unfair nature directed against the goods, subjects, or vessels of the other.

Tariffs, reductions in rates, or other railway facilities, the application of which is dependent upon previous or subsequent carriage of the goods upon vessels of any state-owned or private shipping undertaking, or which are made conditional upon a given sea or river connexion, shall unconditionally apply in the same direction and on the same routes to the goods carried in

the vessels of either of the contracting parties and arriving at or departing from a harbour of the other party.

*Article IX.*

In all that regards the stationing, loading, and unloading of vessels in the ports, docks, roadsteads, and harbours of the territories of the contracting parties no privilege or facility shall be granted by either party to vessels of that party which is not equally granted to vessels of the other party from whatsoever place they may arrive and whatever may be their place of destination.

*Article X.*

In regard to duties of tonnage, harbour, pilotage, lighthouse, quarantine, or other analogous duties or charges of whatever denomination levied in the name of, or for the profit of, the Government, public functionaries, private individuals, corporations, or establishments of any kind, the vessels of either of the contracting parties shall enjoy in the ports of the territories of the other treatment at least as favourable as that accorded to vessels of the other party.

All dues and charges levied for the use of maritime ports shall be duly published before coming into force. The same shall apply to the by-laws and regulations of the ports. In each maritime port the port authority shall keep open for inspection by all persons concerned a table of the dues and charges in force, as well as a copy of the by-laws and regulations.

*Article XI.*

If a vessel of either of the contracting parties be stranded or shipwrecked on the coast of the other or is compelled by stress of weather, or by accident, to take shelter in a port of the territories of the other, both the vessel and her cargo shall enjoy the same favours and exemptions as the laws of the country grant to its own vessels in the same circumstances. The captain and crew, both as regards their own persons and the vessel and her

cargo, shall be rendered the same aid and assistance as subjects of the country where the vessel is stranded would be entitled to by law.

Furthermore, the contracting parties agree that salvaged goods shall not be subjected to the payment of any customs duty unless cleared for internal consumption.

*Article XII.*

The nationality of vessels shall be recognized by each of the contracting parties in accordance with the laws and ordinances of the other, and shall be proved by the documents issued by the competent authorities and carried on board. The certificate of registry lawfully issued by either of the contracting parties shall duly be recognized by the other party. Internal legislative rules and regulations concerning the manning, the equipment, the fitting, and the safety requirements of vessels of each party shall, subject to any international agreement binding on the parties, duly be recognized in the ports of the other party.

*Article XIII.*

The provisions of this agreement as to navigation shall apply equally to the coasting trade, but shall not be held to restrict the right of either contracting party to give financial assistance to ships registered in its territories or to regulate its sea fisheries.

*Article XIV.*

Subject to any international convention binding on the contracting parties, the provisions of this agreement regarding British and Indian vessels shall, with the necessary modifications, apply to aircraft of any kind registered in the United Kingdom and in British India respectively.

*Article XV.*

Internal duties, which are or may be levied within the territories of either of the contracting parties for the benefit of the



state, or a local authority, or other corporation on the produce or manufacture or consumption of goods, shall not affect the goods of one party imported into the territory of the other under any pretext whatever to a greater extent, or in a more restrictive way, than goods of the same kind which are the produce of that party.

*Article XVI.*

The subjects of either of the contracting parties shall be entitled to enter the territories of the other, and to travel, reside, take up domicile, and follow occupations therein, subject to the same conditions as apply to the subjects of the other party. They may carry on their commerce either in person or by any agents whom they may think fit to employ, and they shall enjoy in respect of their persons and property, rights and interests, and in respect of commerce, industry, business, profession, occupation, or any other matter the same treatment and legal protection as subjects of the other party. No taxes, rates, customs, imposts, fees which are substantially taxes, or other similar charges shall be imposed on them which are not equally imposed on subjects of the other party.

Provided that when definite pecuniary assistance, such as a bounty, is granted to any industrial undertaking in India, provision may be made by the authority granting such assistance that it shall not be conceded to any person, partnership, or company not already engaged in that industry in India, unless (1) reasonable facilities are granted for the training of Indians, and, in the case of a public company, unless further (2) it has been formed and registered under the Indian Companies Act, 1913, or any Act amending that measure, and (3) such proportion of the directors as the said authority may prescribe consists of Indians.

Provided always that any such assistance shall be available to any person, partnership, or company already engaged in that industry in India although it does not comply with the said conditions, and that it shall be available without dis-

crimination to all persons, partnerships, or companies which comply with the said conditions.

*Article XVII.*

The subjects of either of the contracting parties in the territories of the other shall be at full liberty to acquire and possess every description of property, movable and immovable, which the laws of the other party permit or shall permit its subjects to acquire and possess. They may dispose of the same by sale, exchange, gift, marriage, testament, or in any other manner, or acquire the same by inheritance under the same conditions as are or shall be established with regard to subjects of the other party.

Provided that this Article shall not apply to any immovable property in any part of British India, under the laws of which, at the date of the coming into force of this Agreement, acquisition of such property by European British subjects is prohibited or limited, in so far as such prohibition or limitation extends.

The subjects of either party shall also be permitted on compliance with the laws of the other party freely to export the proceeds of the sale of their property and their goods in general without being subjected to other or higher duties than those to which subjects of the other party would be liable under similar conditions.

*Article XVIII.*

The subjects of each of the contracting parties shall have in the territory of the other the same rights as subjects of that party in regard to patents for inventions, trade marks, and designs, upon fulfilment of the formalities prescribed by law, subject to any international convention binding on the parties.

*Article XIX.*

The contracting parties further agree that, should privileges in respect of any of the matters dealt with in this agreement be

conceded in the territories of either party to the subjects and vessels of any other country, whether or not a part of His Majesty's dominions, these privileges shall, if they exceed the rights conferred by this Agreement on the subjects and vessels of the other party, be extended simultaneously and unconditionally, without request and without compensation, to the subjects and vessels of the other party.

*Article XX.*

The contracting parties reaffirm their adherence to the principle of Imperial Preference and their desire, as far as may be compatible with the interests of their subjects, to maintain and extend the system as it now exists between them. The acceptance of this principle as a part of their permanent policy is subject to the unqualified right of either party to adopt from time to time such tariff measures as seem best adapted to further the well-being of its subjects.

*Article XXI.*

The contracting parties agree to consider in a friendly spirit, with a view to any possible adjustment, any difficulties which may be brought to their notice as regards the interpretation or application of this Agreement by subjects of the other party. Should such adjustment prove impracticable, and should discussion of the issue between the contracting parties fail to bring about a settlement within a reasonable period, the matter shall, if either party so desires, be submitted for an arbitral decision to the Judicial Committee of the Privy Council or such other inter-Imperial tribunal as may from time to time be agreed upon by the parties. The preliminary question whether the matter in question is one of the interpretation or application of the agreement shall, in the event of dispute, be decided by the tribunal.

The tribunal shall have power to determine the mode of procedure to be followed, to decide in what manner the costs

of the proceedings shall be defrayed, and to award compensation to the subjects of either contracting party in respect of any losses which they have suffered arising out of the misinterpretation or misapplication of this agreement.

The contracting parties undertake to give full and immediate effect to the decision of the tribunal.

The tribunal may, at the request of either party, in addition to deciding the issues actually presented to it, make recommendations as to the interpretation or application in future of the provisions of the agreement which have occasioned the dispute. The parties agree to consider these recommendations with a view if possible to their adoption.

*Article XXII.*

The stipulations of this agreement may be applied to any of His Majesty's Colonies, Possessions, Protectorates, and Mandated Territories, on the application of the Government of the territory concerned, and with the concurrence of the two contracting parties.

*Article XXIII.*

This agreement shall be applicable to any Indian State admitted to membership of the federation of India in accordance with the terms of the Government of India Act, with effect from the date of such admission, subject, however, to such modifications as may be specified in the Order in Council providing for the admission of the State.

*Article XXIV.*

This Agreement shall come into force on such date as may be appointed by Order of His Majesty in Council.

To be signed for the United Kingdom by the Prime Minister, for the Government of India by the Secretary of State for India in Council.

(It was proposed that the Agreement should be enforced by

legislation in the United Kingdom and in British India, and that power should be given in the United Kingdom to the King in Council, and in British India to the Governor-General by Ordinance, to supply any emergent defect in legislation from time to time, for example to give immediate effect to any decisions of the tribunal under Article XXI.)

III  
CONSTITUTIONAL LAW IN THE  
UNITED KINGDOM



## 1. THE KING'S VISIT TO FRANCE: MINISTERIAL RESPONSIBILITY

*To the Editor of THE SCOTSMAN, 27 November 1918.*

In Reuter's message from Paris, published in your issue of to-day, the remarkable assertion is made that the King's visit to France is in his capacity as supreme head of the British Army, and that 'for this reason' His Majesty will include in his suite no member of the British Government. If the statement is to have any meaning, it can only be interpreted as implying that in his military capacity the King stands in a different relation to his Ministers from that which governs his actions in a civil capacity, and that there exists in this country some analogue of the position under the German Imperial Constitution, which placed the Emperor in direct relationship to his army without ministerial intervention.

In fact, of course, no such anomalous position exists. His Majesty's most appropriate visit to France is undertaken with ministerial advice and on ministerial responsibility. The absence of a Minister from the Royal suite on such an occasion is a mere matter of convenience, and has no constitutional significance whatever.

## 2. PARTY CONFLICTS AS ESSENTIAL CONDITION OF DEMOCRATIC PROGRESS

*To the Editor of THE SCOTSMAN, 8 December 1919.*

'Almost with one voice the world democracies have condemned the renewal of party conflict' was one of the Prime Minister's dicta at Manchester, as reported in your issue of to-day.

But what are the facts? In Canada, the Commonwealth of Australia, New Zealand, the Union of South Africa, and Newfoundland, the close of the war has been followed by the revival in an intense form of party conflicts, no less bitter than



those which are wrecking the peace settlement in the United States. In Italy the general election has largely increased the power of Socialism in its most pronounced and anti-monarchical form, and the governmental appeal for union met with remarkable apathy. Every competent observer agrees as to the profound party divergencies in Germany and in the new European States. In Belgium Socialism has attained a position of all but equality in the Lower House with the Catholic party, and the latter has been compelled to accept an extremely advanced policy as a result of this party victory. There remains, therefore, to support the Prime Minister's sweeping assertion the solitary case of France, which, under the influence of an immediate menace from Germany, is for the time being united in views of foreign policy; that in domestic policy there is any agreement in France to drop party views is not supported by any evidence, and runs counter both to recent events and expert opinion.

If any conclusion is to be drawn from practice in the world democracies, it is plainly that party conflict is an essential feature of democratic progress.

### 3. THE PREMIER ON HONOURS AND PARTY POLITICS

*To the Editor of THE SCOTSMAN, 18 July 1923.*

Two points of great interest are raised by the Prime Minister's defence of political honours reported in your issue of to-day.

In the first place, the Prime Minister has disposed of one accusation, reiterated *ad nauseam* by his personal followers against Liberals who disagree with them. Instead of deploring the existence of parties, 'he descanted', in the words of your Parliamentary Correspondent, 'on the value of party politicians and the need for party organizations, and warned the House, and particularly the Labour party, of what might

happen if party organizations disappeared'. It is as well to have the fact emphasized.

In the second place, the Prime Minister committed himself to the remarkable doctrine that no Prime Minister, when the party Whips submitted names for honours for political services, had had any knowledge as to who had contributed to the party funds or not. This clearly does not accord with Mr. Asquith's statement, and must be regarded as frankly incredible. It is presuming too much simplicity on the part of Prime Ministers to acquit them of more than a suspicion, when a person of blameless character but no political reputation is put forward for an honour on political grounds, that the proposal means that the party funds have profited, especially when it is remembered that these donations are never as secret as those concerned in them would wish them to be.

What is really needed is frankness and honesty<sup>1</sup> in these matters. It is surely ridiculous, in view of the history of the peerage, to deny the justice of creating such an honour in favour of a man who has given generously to his party, in the belief that his party is working in the best interest of the State, provided that his personal character and public actions conform to the accepted standard of honourable conduct. What is open to grave objection is to give such honours, and pretend they are accorded on other grounds.

#### 4. THE CROWN AND DISSOLUTION OF PARLIAMENT

*To the Editor of THE TIMES, 22 January 1924.*

Professor Pollard's defence of the doctrine of the discretion of the Crown in regard to granting the request of a Prime Minister for a dissolution, as expressed in his lecture on January 21, appears to derive its value entirely from ignoring the essential distinction between advice to dissolve and other suggestions made by a defeated Administration. A Prime

<sup>1</sup> See the Honours (Prevention of Abuses) Act, 1925; *Maundy Gregory, In re* (1934), 50 T.L.R. 492; Ridges, *Const. Law* (ed Keith), pp. 197, 198.

Minister who no longer commands the confidence of the House of Commons has manifestly no power to advise the disbanding of the Army or the paying-off of the Navy; if he did so his action would be manifestly a gross violation of the Constitution, and the Crown could not accept the advice without sharing in the violation. But to advise a dissolution is to appeal from the House of Commons to their masters, and both the weight of precedent and common sense suggest that the Crown has no real right to refuse a dissolution, save in the practically inconceivable case in Britain of a Prime Minister asking, after one dissolution had been granted and had resulted in an adverse verdict, for a second dissolution.

To assert the existence of a discretion is to impose a most serious obligation on the Crown, for, if it has a discretion it is bound to accept responsibility, and its action must become the subject of party comment, as can be seen from those cases in the Dominions in which Governors exercise the right.<sup>1</sup> That a Governor should be denounced as partial matters little enough to any one except himself; it would be a very grave thing if the Crown were divorced from its impartiality. What the Crown legitimately possesses is personal influence, and it is safe to assume that this influence, in conjunction with the good sense of British politicians, will prevent the issue of the Crown's discretion from ever becoming a matter of other than theoretic interest.

## 5. THE RESPONSIBILITY OF PARTY LEADERS

MR. LLOYD GEORGE'S QUESTION: DOMINION PRACTICE

*To the Editor of THE SCOTSMAN, 29 April 1929.*

In the absence of British precedent Dominion practice may shed some light on the responsibility of party leaders in the event of the General Election failing to give a clear majority to the Government. In such a case the electors would not expect the Governor-General to solve the difficulties of the

<sup>1</sup> See I, Nos. 38, 39, and 43, *ante*.

situation, and still less would it be justifiable to place any burden on the King after his long illness. The Dominion would demand that the party leaders should consult, and that the two parties which had closest affinity should agree on the mode in which the Government was to be carried on until such time as circumstances should justify a fresh appeal to the people.

It does not appear that under Dominion practice Mr. Lloyd George has any right to expect a categorical reply from Mr. Baldwin to his inquiry of Saturday. If the Prime Minister fails to obtain a majority from the electorate but remains at the head of the largest party in the House of Commons, he will no doubt feel that his duty to the country requires that he should endeavour to obtain from one or other of the Opposition parties aid in carrying out a modified programme, omitting proposals for which there is no majority in the House of Commons. If the Liberal party, with which, as you justly argue, the Unionists have greater affinity than with Socialists, proves intransigent, and insists on uniting with the latter to defeat the Government, Mr. Baldwin will have undoubtedly a serious burden to face, which can hardly be disposed of on the mere ground of the relative strength of the Opposition parties. The country is surely entitled to expect that the dominant consideration will be which of the Opposition parties, if placed in office by Unionist support, will be the more likely to carry out a safe and cautious policy at home and abroad, and that Mr. Baldwin will take care to ascertain this as definitely as possible before advising the King for whom to send. Responsibility will, one may assume, be assigned by the electorate, not on the basis of any technical reasoning, but on the attitude adopted by each party in its bearing on the permanent welfare of the State, an aspect which was insufficiently considered by the Liberal party in 1924.<sup>1</sup>

<sup>1</sup> The action of Mr. Baldwin and the Liberal leaders placed in power a Labour Ministry whose mismanagement of finance was held by both Conservative and Liberal leaders to necessitate in 1931 the reconstruction of the Ministry on the basis of the removal from office of all save a minority of the members of the Cabinet.

## 6. THE POLITICAL SITUATION

*To the Editor of THE SCOTSMAN, 3 June 1929.*

It is remarkable to learn that some of the Prime Minister's best friends think that he ought to resign at once. From a constitutional point of view such action would be justified only if there existed a party which had a clear majority in Parliament and was able to assume authority forthwith, in the knowledge that it possessed the confidence of the country. In fact, 13,744,000 voters have expressed their preference for the Unionist or Liberal parties as opposed to 8,311,000 who have voted for a Labour Ministry. Our imperfect electoral system has not reproduced with any fairness the effect of the voting, but even under it the Labour party must be in a minority of over twenty votes in the House of Commons.

We must believe that the attacks on the competency of the Labour party to manage wisely the foreign and domestic affairs of the State, which have been made by Unionist leaders, were sincere, and, if that is so, it is clear that the Prime Minister cannot be justified in resignation unless and until the House of Commons compels him to adopt that course. Immediate resignation would, in view of the state of His Majesty's health, be equivalent to advice for the unconditional appointment to office of the Labour party, the moral responsibility for which action would rest on Mr. Baldwin. The clear course of action is that which evidently appeals to the ripe political wisdom of Sir Austen Chamberlain. The Prime Minister should meet the House of Commons with a policy of carrying on the King's Government, while laying aside matters of acute party controversy, such as the safeguarding proposals. It would then lie with the Liberal party to decide the fate of the administration. If it preferred to support Labour, then the responsibility of doing so would rest with it. The suggestion that by refraining from voting the Liberals could evade this responsibility is frankly impossible; such abstention would properly be regarded as a definite preference for a Labour Government.

It appears to be held in some Unionist circles that there is a tactical advantage to be gained by immediate resignation, but I trust that on reflection they will recognize that the interests of the country should be put above party advantage, and I may add that, though party considerations have sometimes determined action in like conditions in the Dominions, it has seldom, if ever, proved in the long run profitable to prefer sectional interests to those of the State. Time, moreover, is essential to allow the opinion of the country to consolidate in favour of the best mode of action to meet the present complex situation and to give the King the most favourable opportunity of regaining strength.

## 7. THE CONSTITUTIONAL RIGHTS OF THE HOUSE OF LORDS

*To the Editor of THE SCOTSMAN, 1 July 1920.*

Is it really possible to defend on constitutional grounds the attitude adopted by the Lord Chancellor towards the Bill passed by the Commons to declare the right of certain Scottish litigants to have costs awarded to them in successful appeals in the House of Lords? The only justification of the attitude of the Upper Chamber would be that the measure interfered with the right of that body to lay down its own rules of procedure, and Lord Birkenhead asserted that the Bill in question did so interfere. But this contention can be maintained only by the deliberate confusion of the two entirely distinct aspects of the House of Lords as a part of the Legislature and as a Court of Appeal. In the former capacity it must be free to regulate its own proceedings as part of its inherent privileges with which the House of Commons has no right to interfere. In its latter capacity its procedure is largely regulated, admittedly so in the case at issue, by rules made under statutory powers. To propose by statute to alter one of these rules cannot without absurdity be regarded as a breach of the right of the House of Lords in its legislative capacity to regulate its own procedure.

Apart from theoretic objections to the course adopted by the Lord Chancellor, there are strong practical objections to confusing the two functions of the House of Lords. It is remarkable that the Lord Chancellor should have forgotten the strong protests quite fairly made by his party during the political campaign of 1905 against attributing to the Lords as a legislative body the famous judgements which were held by Labour to deprive Trade Unions of the privileges which the Legislature intended to confer upon them, and conversely it is certain that Labour tends to regard with suspicion judgements of the House of Lords which it deems contrary to its interests as emanating from a body of hereditary legislators, and not, as in point of fact, from a purely legal tribunal. Not the least pressing ground for the reform of the Upper House is that it will necessitate the termination of an anomalous position which seems to have led even the Lord Chancellor astray.

## 8. HOUSE OF LORDS REFORM

*To the Editor of THE SCOTSMAN, 30 June 1927.*

In the discussion of the proposed reform of the House of Lords too little stress, it seems to me, has been laid on the necessity of safeguarding the position of the Crown. It appears that Lord Birkenhead is prepared to maintain that His Majesty can constitutionally be asked to assent to a Bill passed by the two Houses in the present Parliament, under which the prerogative would be vitally changed, and the Upper Chamber would be placed in a position in which its composition and powers could never in future be modified without its consent. Surely it would be utterly unfair to place the King in the position of having to give or withhold assent to such a measure before the policy had been approved at a general election. His Majesty, of course, is not expected to form any judgement on ordinary measures of legislation which, passed by one Parliament, can be repealed by another. But the position of the Crown is clearly different as regards vital constitutional

changes, and respect for the King and due regard to the necessity of keeping the Crown free from any charge of partisanship appear clearly to demand that the proposed changes in the position and composition of the Upper House should only be carried out after the matter has been submitted for consideration to, and approved in principle by, the electorate at the next general election. Nor, it may be added, is there much doubt that, if the scheme has to be explained and defended before the electors, the Government will evolve something a good deal more satisfactory than the present limited and rather incoherent proposals.

### 9. HOUSE OF LORDS REFORM

*To the Editor of THE SCOTSMAN, 11 November 1932.*

Those of us who are not convinced by the Labour intelligentsia that a Second Chamber is needless, must regard with dismay the suggestions of the Joint Committee of Unionists for a reform of the House of Lords. What is needed is a Chamber to perform the functions laid down by the Bryce Committee in a spirit of impartiality. What is offered in lieu is a body which, as regards one-half of its members, is to perpetuate the principle of hereditary qualification for legislation, and which is to be constituted so that it shall always be pre-vaillingly Conservative, though, with kindly consideration, Labour members are to be granted additional allowances, presumably to enable them to vie in sartorial splendour with their peers. This body is to have power to limit expenditure in the interests of the property-owning classes which the great majority of its members would represent; the definition even of taxation measures is to be drastically limited, although the Committee well knows that several very important financial measures have already failed to receive the certificate of the Speaker as Money Bills under the Parliament Act, 1911. As regards all other measures this body could delay passage until after endorsement at a general election, which, of course,



means that a Labour House of Commons would have to accept unwise amendments rather than compel the country to await an election, or a dissolution would be necessary with all the waste of time and money.

That a National Government whose programme ignored the reform of the House of Lords should be asked seriously to consider passing any such measure would be constitutionally monstrous, and action will no doubt not be taken. But the danger clearly is that, failing modern and sane reform proposals, we shall find the Upper Chamber swept out of existence. It is significant of the spirit of the report that it is still desired to give representation to the Church of England alone, and that it is not even proposed to get rid of the anomaly of the position of the Lords of Appeal in Ordinary.

## 10. HOUSE OF LORDS REFORM

*To the Editor of THE SCOTSMAN, 20 December 1933.*

It is to be regretted that Lord Hailsham has not manifested the same concern for the prerogative in the case of Lord Salisbury's Bill as he has in regard to the abolition of the right of appeal from the Irish Free State.<sup>1</sup> In the latter instance, despite the Statute of Westminster, he has defended the prerogative so energetically as to excite, as was inevitable, an agitation in the Union of South Africa, which General Hertzog was endeavouring to lay to rest. Lord Salisbury is frankly attacking an ancient and undoubted prerogative of the Crown, without, of course, the assent of the King, and it is notorious that no Bill of this kind can pass either House unless and until the King, on the advice of his Ministers, accords that assent. Now Lord Hailsham knows well that the Government cannot advise the King to permit the House of Lords to pass any measure of the kind proposed. A fundamental alteration of the Constitution, involving the destruction of a vital prerogative, cannot be carried out without a definite mandate from the electorate, as

<sup>1</sup> See I, No. 100.

the proceedings of the Crown in respect of the Parliament Bill definitely proved. Under these conditions, it is clear that the proper course was for Lord Hailsham to advise Lord Salisbury that his Bill could not proceed, and that he ought to take the only constitutional course of proceeding by way of a resolution.<sup>1</sup> For those who advocate changes in order to prevent revolutionary action to ignore the binding principles of the Constitution is surely unwise in the extreme.

The debate reveals the regrettable fact that it is not realized in the House of Lords that no increase of powers is possible unless the hereditary principle is replaced by election. Lord Astor's preference for nomination is not supported by Dominion experience, while the two States of the Commonwealth which have had the worst experience of reckless Socialism are those which have not had elective Upper Chambers.

## 11. THE ALTERATION OF THE CONSTITUTION

*To the Editor of THE SCOTSMAN, 9 February 1934.*

Apart from the question of privilege raised by Sir Adrian Baillie in respect of the address from the House of Lords relative to the Bill for the reconstitution of that Chamber and the relationship between the two Houses,<sup>2</sup> there is surely a much more vital principle of modern constitutional practice involved. It is clear that the King cannot deal with the request of the Lords without the advice of his Ministers, and that his answer must depend on their wishes. Now the alteration of the Constitution of this country is essentially under the principles of responsible government a matter for the Ministry of the day. It is neither its duty, nor is it proper, that it should leave the task to other hands, or accord its aid to any attempt to alter the Constitution for which it is not prepared to take responsibility.

Further, it is clear that the present Government has no man-

<sup>1</sup> Lord Salisbury in fact did not ask for a Committee Stage on his Bill, which thus served no useful purpose and in 1934 the Government definitely negatived any legislation and admitted the absence of any Cabinet agreement.

<sup>2</sup> The Speaker ruled that no question of privilege arose.

date whatever for the alteration of the Constitution, a proposal absolutely ignored by the leaders of the parties, who joined to form the Ministry which appealed to the people, in their addresses asking for our support. It would be absolutely deplorable if the principle once were asserted that a Government under modern conditions is entitled to propose vital constitutional changes after attaining power for quite different grounds. This doctrine is so important that I cannot imagine that any Conservative statesman would be willing to countenance such a theory of the Constitution. Sir Stafford Cripps is acting with perfect propriety when he demands that the electorate shall be warned beforehand what the Government they elect intends to do.

It follows, therefore, that the sound constitutional position for the Ministry is to decline to recommend compliance with the address on the ground that no fundamental constitutional legislation can be undertaken except on its authority, and that it is not prepared to sponsor the measure in question. It is useless to argue that the Lords should have the right to discuss the measure even if only for academic purposes. The House of Lords has a perfectly simple and effective means of making known its views of its own constitution, namely, by passing resolutions which can be debated at any length and in any detail desired by that body.

That a reformed Second Chamber is necessary is unquestionably the opinion of many of us, but the mode of securing it must be the constitutional one of laying proposals in outline before the electorate at the next general election, and permitting the electorate to decide.

## 12. A FEDERAL CONSTITUTION FOR THE UNITED KINGDOM

*To the Editor of THE TIMES, 23 May 1918.*

There is one point of fundamental importance to which insufficient attention appears to be paid in most, if not all,

recent discussions of the advantages of a Federal Constitution for the United Kingdom. The arguments which have been adduced in favour of relieving the Imperial Parliament of the duty of dealing with local affairs are of great weight, but the obvious remedy which they support is devolution, not federation. Federation, if used in any accurate sense, involves not merely the existence of legislative bodies other than the Parliament of the United Kingdom, but the grant to these bodies of powers exclusive of those of that Parliament.

The question, in fact, which arises is whether the advocates of a Federal Constitution for the United Kingdom really desire to place the new legislative bodies to be created in the same relation to the Parliament of the United Kingdom as is held by the Provincial Legislatures of Canada and the State Parliaments of Australia towards the Dominion and Commonwealth Parliaments respectively, or in the relation of complete subordination occupied by the Provincial Councils of the Union of South Africa. The establishment of subordinate legislatures, e.g. for Ireland, Scotland, or Wales, would raise no fundamental difficulties, for these bodies, though with much wider powers as well as areas of action, would occupy in law essentially the same position as such bodies as county councils. Federation, however, would involve the creation of a formal Constitution, and the subjection of the laws passed by Parliament to the power of the Courts to pronounce them *ultra vires*. Admirable as the Constitutions of Canada and Australia are in many respects, having regard to the special needs of these vast territories, it is open to the gravest doubt whether it is wise deliberately to bring upon ourselves the legalism of Federal Constitutions, when devolution might well meet the needs of the situation.

### 13. FEDERAL DEVOLUTION

*To the Editor of THE SCOTSMAN, 1 July 1918.*

It is much to be regretted that the Prime Minister, in his reply to the deputation on federal devolution, reported in

your issue of to-day, did not specify the precise sense which he attaches to the federal principle of which he expressed approval. If the term federal is to be accorded the sense which it now normally bears, it denotes a system in which a rigid line of demarcation is drawn between the powers of the Central and Local Legislatures and Governments, both being confined within their due limits by the action of the Courts of Law. The introduction of a true federal system in this country would necessitate the creation of a formal Constitution, the limitation and definition of the power of the Central and Local Legislatures, the provision of some means, probably involving the use of the referendum, for altering the Constitution, and the establishment of a new Second Chamber on a federal basis for the Central Legislature. In practice, as the experience of the United States, Canada, and Australia abundantly proves, the actions of Government and Legislatures, Central and Local alike, would be constantly called in question before the Courts, and the pressing social reforms requisite to meet post-war conditions would be delayed or defeated.

Is there any evidence that a true federal system is desired by the people of Scotland? Would not all that is necessary or desirable be acquired by the creation of purely subordinate Legislatures—which is the normal implication of the term devolution—with the necessary executives? In Scotland and Wales such bodies might perform really useful services and satisfy national feeling; in Ireland, of course, even the most moderate Nationalists demand powers of taxation which are inconsistent with any modern federal system, while the advanced members will be contented with nothing short of Dominion status, but the offer of devolution on the same basis as that accorded to Scotland and Wales would at least have the advantage of meeting the views of certain sections of opinion in the Dominions. Nor is there any logical reason for postponing devolution to the parts of the United Kingdom other than England until the pro-

blematical period when England will desire devolution for itself.

A third course of action has been suggested by Lord Salisbury, who seems to think that a delegation of legislative power to local bodies might be arranged without the creation of corresponding executive bodies. Apart from objections to the practicability of working such a scheme, it must be pointed out that it would not in any effective manner satisfy the national aspirations which underlie the movement for devolution.

#### 14. SCOTTISH SELF-GOVERNMENT

*To the Editor of THE SCOTSMAN, 28 October 1932.*

Before Conservatives make up their minds to oppose the establishment of a Scottish Parliament, I hope that they will take the trouble to examine conditions in the Dominions. They will find, I am certain, much reason to believe that great benefits accrue from the possession in the federations of local Legislatures, and that the fears of injury to material interests in Scotland by restoration to it of a Parliament are based on misconceptions. What is obvious to any one who has followed the question is the steady spread of national feeling in recent years, and now that the Irish question has been removed the time has surely come when the matter should no longer be regarded as the policy of any one political party. What is requisite is very careful consideration of the best form of relations to be devised between England and Scotland, and in such a work Conservatives should take their proper share. The alternative is to allow the movement to pass into the hands of persons with extreme views. Much, no doubt, may be said for the claim of Dominion status for Scotland, and if no suitable alternative is offered there is every reason to expect that national feeling will ultimately pronounce for that ideal. Surely Irish history ought to warn us against mere opposition to every change.

### 15. A SCOTTISH PARLIAMENT: THE DOMINIONS ANALOGY

*To the Editor of THE SCOTSMAN, 2 November 1932.*

The Duchess of Atholl forgets that, if the English people demand that the English Parliament shall also be the Imperial Parliament, they cannot claim a reduction of Scottish representation despite its inconvenience. But the English people have strong common sense, and if they agree to Scottish Home Rule they will no doubt accept the logical corollary, a Federal Parliament. In either cases there will still be ample room for the ambitions of those Scotsmen who can make their headquarters London and whose personal advantage the present system so admirably serves. But I am unable to believe that the affairs of Scotland are best controlled by a Parliament and Government to whom Scotland is a remote and petty province, whose spokesmen are prevented from united action as a national group by their membership of one or other of the great political parties, and who are constantly subjected to the influence of London opinion. That Scottish affairs should be regulated by those whose life work lies in Scotland is a conclusion which all Dominion experience supports, and of which the history of Natal since 1910 affords an excellent illustration.

I referred to Ireland as a warning of the results of intransigence. From 1906 Unionists denied the claims of the national feeling of Southern Ireland, Liberals those of Northern Ireland. Hence arose rebellion, civil war, and our present deplorable relations, when His Majesty is forced to dismiss a Governor-General whose one offence was a protest against insult to the Crown. If Scotland is driven to demand Dominion status, it will, I fear, be due to the same lack of foresight and sympathy with national feeling which has brought about the Irish disaster. Wise concession is the best prevention of revolution.

16. THE STATE AND BREACH OF CONTRACT  
BY WORKERS

*To the Editor of THE SCOTSMAN, 3 October 1919.*

It may be of interest to note, in connexion with the discussion<sup>1</sup> in your issue of to-day, of the legal right of the Government to withhold payment of wages of railway employees, that the doctrine of English law permits summary dismissal of a servant whose unlawful absence from duty gives rise to serious inconvenience, and that in such an event the servant is entitled only to such wages as have completely accrued; thus a servant, paid weekly, if dismissed in the course of the week, has no claim to payment for the work done that week, though entitled to payment in respect of the preceding week, if for any reason such payment has not been made before his dismissal. The doctrine has recently received interesting illustration in a case decided by a County Court judge, in which it was held that a servant who left her situation one day before the expiration of her engagement could not recover from her employer any wages for the period after the expiration of her last complete month of service, the employment in this case being under a monthly engagement.

Under English law, therefore, there can be no doubt that the railwaymen who went on strike are not entitled to receive payment of any wages which had not legally accrued before their breach of contract was committed. On the other hand, it is equally certain that the men are entitled to accrued wages, if any, and that no employer may withhold accrued wages to meet damages which may be awarded to him for breach of contract by servants. The legality at English law of the action of the Government depends, therefore, in each case on a question of fact, and redress for any wrong will be afforded by

<sup>1</sup> Some censure was expressed of governmental withholding of wages from railway employees on strike on the score that such action was illegal, and to be condemned in a Government, whatever the provocation.



the Courts. But to censure, as matters stand, the decision of the Government is to ignore the fact that the method in which the strike has been conducted makes it clear that it is the aim of some at least of the strikers to challenge the supreme authority of the State itself.

## 17. SIR JOHN SIMON AND THE GENERAL STRIKE

*To the Editor of THE SCOTSMAN, 12 May 1926.*

It is with equal regret and surprise that many Liberals have noted the policy in regard to the strike recommended by Sir John Simon immediately after his exposition of legal principles which, though a commonplace to lawyers,<sup>1</sup> seem to have been little appreciated by the public in general. The essence of Sir John Simon's proposal is to efface the distinction which he himself drew between what is lawful and what is wholly illegal, for he now brackets the cancellation of the new terms offered to the miners by their employers with the calling-off of the general strike. I cannot understand how Sir John Simon can fail to see that his action is essentially a condonation of illegality, and a recognition of the effectiveness of the general strike as a means of compelling the Government to yield the power entrusted it by the people at the demand of a minority enforced by discreditable means. It may well be that the Government should have dealt otherwise than it has with the position of the miners, but it is perfectly clear that, whatever verbal claims may be made, if it yields before the unconditional withdrawal of the general strike, it will definitely have conceded the authority of the trade unions to control the policy of the country and have abrogated the sovereignty of Parliament. The utter disregard of the unions for public interest proves the folly of any such course.

The Government, I think, might explain why it failed to ask

<sup>1</sup> The illegality of a general strike was declared by the Court in *National Seamen's and Firemen's Union v. Reed*, [1926] Ch. 536. The strike was called off unconditionally on May 12.

the High Court for an injunction<sup>1</sup> against the action of the leaders in calling the general strike. The power to issue injunctions has often been used with satisfactory effect in America, and resort to this weapon at an early stage would at least have had the advantage of making perfectly clear the illegality of the whole proceedings.

## 18. THE TITLE PROTESTANT

*To the Editor of THE SCOTSMAN, 27 May 1933.*

The title Protestant seems to have fallen into some disrepute with Presbyterians and members of the Church of England alike.<sup>2</sup> It was not always so. When under the Canadian Constitutional Act of 1791, the Clergy reserves were set aside for the maintenance of a Protestant clergy, so little did the Church of England despise that style that they contended down to 1840 that they alone fell under it, and denied the claims put forward by the Church of Scotland, though both the Law Officers of the Crown and the judges were willing to admit that the Church of Scotland had a claim to share. Moreover, in the great Act which conferred emancipation on Roman Catholics, the Churches of England and Scotland are signalled out as Protestant on an equal footing. Neither Church has any reason to be ashamed of its Protestant character, and our Assembly has most wisely asserted that we admit no inferiority to the Church of England.

<sup>1</sup> The Trade Disputes and Trade Unions Act, 1927, authorizes the Attorney-General to apply for an injunction to restrain the application of the funds of a trade union towards a strike made illegal by that act. But the wider issue remains.

<sup>2</sup> In discussions of the possibility of closer relations between the Churches of England and Scotland, it had been suggested that they had little that was fundamental in common.



IV  
CONSTITUTIONAL LAW IN THE  
DOMINIONS



## I. DOMINION GOVERNORSHIPS: CONSTITUTIONAL THEORY AND PRACTICE

*To the Editor of THE TIMES, 14 September 1917.*

May I be permitted to suggest that in your comment on the retirement of Sir Gerald Strickland from the Governorship of New South Wales in your leader of the 13th inst. hardly sufficient weight is allowed to the radically false constitutional position now occupied by a Governor of a Dominion or State towards his Ministers? It must be remembered that of recent years it has been precisely the ablest of Australian Governors—such as Lord Chelmsford and Lord Carmichael—who have been the subject of most serious public criticism on account of their relations with their Governments.

It is now the established practice in the United Kingdom that the Sovereign in political matters in the ultimate issue accepts the advice of the Ministry in office, a rule which secures to democracy the fullest advantage of monarchical government and of political liberty. The system of responsible government in the Dominions, however, developed at a time before this doctrine was finally and completely recognized in the United Kingdom, and in circumstances of political inexperience among the colonists, which imposed on Governors the duty of acting as the guardians of the Constitution and protectors of the people against possible misuse of political power. It is accordingly still the theory of Dominion Constitutions that a Governor may, and indeed perhaps should, decline to accept the advice of Ministers whom he considers not to represent the popular will, relying on his ability to replace them with other advisers should they resign as a result of his refusal. The position throws upon the Governor a personal responsibility which is more and more out of harmony with modern conditions of political thought in Australia, as may readily be appreciated by study of the very varying comments on the relations between Sir Gerald Strickland and his Ministers

which have appeared in the Australian Press. The true solution of the difficulty is the establishment of the rule of action on ministerial advice in every case, and the principle has been acted upon in one striking instance, that of the grant of a double dissolution of the Commonwealth Parliament in 1914 by Sir Ronald Munro-Ferguson, despite the precedents of refusal of dissolutions established by Lord Northcote and Lord Dudley.

Where Imperial interests are concerned different considerations, of course, arise, affecting the relations of the Dominions and the United Kingdom, but the retention of the old practice in internal matters is now an anachronism, and undesirable as tending to create the impression of the interference of the Imperial Government in the domestic concern of the Dominions, public opinion in which can hardly be expected to draw the delicate distinction between the Governor as head of the local Government and as a representative of Imperial interests.<sup>1</sup>

## 2. DOMINION GOVERNORSHIPS

*To the Editor of THE TIMES, 25 September 1917.*

In the letter published in your issue of the 24th inst. Mr. Swift MacNeill lends the great weight of his authority to the doctrine that it is still part of the constitutional law of this country that the King may dismiss a Ministry if he is of opinion that the Ministry and the House of Commons are alike out of harmony with the country. Widely as this doctrine is accepted, it seems to be that it is impossible now to maintain that it is an effective part of the constitutional law. In the first place, the power has never been used since 1783, for we know now that William IV, however anxious to be rid of his Ministers, did not take the responsibility of dismissing them,<sup>2</sup> and the exercise of a prerogative which has been dormant for 134 years, however

<sup>1</sup> See I, No. 38, 39, and 43, *ante*.

<sup>2</sup> The removal of the Grenville Ministry in 1807 came near dismissal; cf. Ridges, *Const. Law* (ed. Keith), p. 132.

legitimate in theory, would in practice be revolutionary. In the second place—and this is the decisive consideration—the attribution of this power to the Sovereign throws upon the King a wholly impossible burden, namely, the duty of deciding when the Ministry and Parliament are out of harmony with the country, and affords a justification for appeals by sections of public opinion to the Crown to exercise the power, thus bringing the Crown into the arena of political strife.

I cannot, indeed, hope to persuade Mr. Swift MacNeill of the correctness of my view, but I earnestly trust that no Dominion Governor will be seduced into an experiment of dismissal of a Ministry; though precedents of such action could be adduced from periods much more recent than 1783, the time has certainly gone when the attempt can be made without disaster to the Governor himself.<sup>1</sup>

### 3. LABOUR ENACTMENTS IN QUEENSLAND CONSTITUTIONAL ISSUES

*To the Editor of THE TIMES, 25 May 1920.*

Two Acts of unprecedented character have been passed by the Parliament of Queensland, the one depriving certain holders of pastoral and grazing leases of the limitation to a 50 per cent. increase of rent at the periodical reappraisement by the Land Court, the other expropriating on summary notice the undertaking of the Brisbane Tramways Company, leaving it without revenue, to which it would otherwise be entitled, pending the determination of the price, and empowering payment in bonds in lieu of cash.

To secure the passage of these extraordinary enactments, the Labour Government of Queensland have found it necessary to break three constitutional rules. (1) They procured the appointment of a pronounced political partisan to act as Governor. (2) They induced the Acting-Governor to swamp the Legislative Council by adding fourteen members of their

<sup>1</sup> See Nos. 12–17, *post*.



party, notwithstanding that an Act of 1908 prescribed the referendum as the constitutional mode of adjusting disputes between the two Houses, and that in 1917 the people of Queensland refused by an overwhelming majority to approve the abolition of the Council. (3) The Acting-Governor assented to the measures thus forced through the Council, although required by the Royal Instructions to reserve any Bill of extraordinary nature and importance prejudicing the rights of British subjects not residing in the State. The result of these revolutionary steps is to place all power in the State in the hands of the Labour majority in the Assembly, which is nothing but the obedient servant of the Labour Party outside the Legislature.

Now, although the Imperial Government may have no concern with the domestic affairs of Queensland, it is bound to interest itself in the rights of British investors, because, if to-day the Labour Government at the instigation of the Caucus repudiates obligations to Crown tenants and tramway shareholders, what is to hinder it to-morrow varying or cancelling its obligations in regard to holders of Queensland Government stock, which has been constituted a trustee security under Imperial Act of Parliament? The high rate of interest which has now to be paid will afford a cogent and perhaps irresistible temptation to revision in the near future.

The mode of Imperial intervention doubtless raises difficulties. The power of disallowance exists, but the exercise of it may be politically inexpedient, since it makes the Imperial Government arbiter in a case in which it can hardly be a disinterested party. Much more satisfactory would be the adoption of the rule that the procedure in such cases should be assimilated to that of disputes between foreign Powers. If, then, individuals in the United Kingdom had a legitimate grievance against another part of the Empire, it would be open to the British Government to ask that it be referred to arbitration before an impartial tribunal and the same right would be recognized as regards claims against the United Kingdom.

The rule of arbitration is surely one worthy of cordial acceptance *inter se* by parts of one Empire, and the Judicial Committee of the Privy Council presents the nucleus of an Arbitration Court of the highest standing and impartiality, including, as it does, in its membership Dominion Judges of acknowledged rank. The Dominions and States for their part could hardly but welcome so clear a recognition of their new status, or find it derogatory to accept principles applicable to Sovereign Powers and expressly approved by the Covenant of the League of Nations, while British investors would benefit by the substitution of the precarious possibility of disallowance of legislation, unfairly affecting their rights, for the assurance of an impartial determination of the compensation due to them for any change in the terms of their contracts with oversea Governments.

#### 4. LABOUR LAWS IN QUEENSLAND: SECURITY OF BRITISH INVESTORS

*To the Editor of THE TIMES, 29 May 1920.*

The points involved in the Hon. E. G. Theodore's reply in *The Times* of May 21 to my letter of May 25 are so important as to render a detailed rejoinder to the courteous answer of Mr. Theodore imperative.

1. The constitutional rules in question are part of the unwritten constitutional law of Queensland, including, of course, in that term the rules affecting the relations of the State to the United Kingdom. They are rules, not laws, and, like the constitutional rules of the United Kingdom, have been evolved in the course of the constitutional development of the State.

2. Because they are rules, and not laws, they can be contravened, without involving the Government which disregards them in illegality. A simple illustration will make clear to Mr. Theodore a distinction which Professor Dicey's genius has long ago made familiar to British politicians. The Governor could legally dismiss the Premier to-morrow without cause

assigned, but Mr. Theodore would be the first to admit that his action would be utterly unconstitutional, so long as the Premier commanded the confidence of the Assembly.

3. Mr. Theodore asserts that, as persons appointed to the office of Governor have held political opinions before their appointment, it is absurd to object to the appointment as acting Governor of a pronounced political partisan. The essential distinction between the cases, as Mr. Theodore knows better than any one else, is that Governors have held opinions on United Kingdom politics, while his nominee to act as Governor was an ex-leader of the Queensland Labour Party, who had resigned office as Minister in Mr. Theodore's own Government just four months before he began to administer the Government. Moreover, his nominee, whose constitutional duty it was to exercise the independent discretion vested in the Governor regarding the addition of members to the Upper Chamber, had pledged himself in categorical terms to the doctrines: (1) that the office of Governor was absolutely unnecessary; and (2) that 'the whole bally lot' of Australian Upper Houses should be abolished. I cannot believe that the Secretary of State for the Colonies knew these facts when he accepted Mr. Theodore's nomination, and I hope that on reconsideration even Mr. Theodore will agree that it was indefensible.

4. Mr. Theodore is wholly wrong in asserting that 'swamping' Upper Chambers has never been considered unconstitutional; he will find the authorities, all of which contradict his thesis, in my *Responsible Government*, whence he will learn that the famous controversy of 1892 in New Zealand did not deal with 'swamping' but with an addition of a small number of members to afford a Government debating power. But the crux of the whole position, as is obvious, is the Act of 1908, which settled the famous dispute between Lord Chelmsford and Mr. Kidston as to the 'swamping' of the Upper House and which gave the decision in case of disagreement between the Houses to a referendum. Since that Act the 'swamping'

of the Council is as unconstitutional as would be the creation of peers to coerce the House of Lords since the Parliament Act. No true democrat should refuse to permit the people to decide; the time taken need not exceed six months, and the cost, which Mr. Theodore puts needlessly high, is trivial in comparison with the issues at stake.

5. I did not imply that the 'swamping' of the Council was a preliminary to its abolition. I did imply that the 'swamping' meant that the Council as an independent activity in legislation had been abolished. I do not doubt that Mr. Theodore does not propose to use his majority in the Council to abolish it, because (1) there is no motive to remove a subservient tool, and (2) the Bill for abolition must under the Constitution be reserved, and Lord Milner would never take the active responsibility of procuring His Majesty's assent to the measure in view of the refusal of the people of Queensland in 1917 to accept abolition.<sup>1</sup>

6. Mr. Theodore suggests that the submission to arbitration of claims by subjects in one part of the Empire against the Government of another part involves the reactionary principle of the limitation of sovereign rights, a view which is conclusive evidence that he does not understand the proposal. If British subjects complain of acts of repudiation by the French Government, then His Majesty's Government may ask France to arbitrate the issue. Is Queensland so much superior to a sovereign power like France that what France would agree to would dishonour Queensland? Mr. Theodore must know that at present the power of disallowance of Queensland Acts rests with the Imperial Government. I have long advocated its surrender by the Imperial Government as derogatory to the self-respect of a Dominion or State. But, if it is abolished, some means must be provided to deal with inter-Imperial controversies, and what statesman can decline arbitration, the chief

<sup>1</sup> In fact, however, the majority was used in 1921 to pass a Bill abolishing the Council, and this received assent after reservation, in 1922, on Mr. Churchill's advice. See *Responsible Government* (ed. 2), 1. 461, 462.

hope for the peace of the world? Or, to put the issue concretely, if disallowance is ruled out and arbitration is refused, what security has the British investor in Queensland Government stocks? If the Labour caucus bids Mr. Theodore, reluctantly, I am sure, to repudiate the obligations of the State to its tenants and their assigns and to the Brisbane Tramways Company, what is to hinder it bidding him to raise a capital levy on Government stocks or to reduce by half the rate of interest?

## 5. LABOUR LAWS IN QUEENSLAND

*To the Editor of THE TIMES, 5 June 1920.*

May I reply briefly to certain misapprehensions in Mr. Theodore's letter printed in your issue of June 4?

1. Queensland has not, as Mr. Theodore supposes, a written constitution in the technical sense of that term; as in the United Kingdom by far the greater part of the Constitution, including the operation of the principle of responsible government and the conduct of relations with the United Kingdom, rests on constitutional usage which possesses no direct legal sanction; and my contention is that in swamping, on Mr. Theodore's advice, the Upper House the acting Governor acted unconstitutionally.

2. Mr. Theodore's theory of the relation of Upper Houses to Lower Houses would reduce the former to impotence, and harmonizes perfectly with the doctrine of the abolition of the Legislative Council, which is one of the main planks of his party's platform. But it must be clearly understood that the theory has no relation to the facts; whether elective or nominee, the Upper Chambers of Australia have asserted against Governments of every political colour their independence—an attitude, rightly or wrongly, approved by an overwhelming majority of the voters of Queensland at the referendum of 1917.

3. In his assertions regarding the delay of a referendum,

Mr. Theodore must surely have forgotten that in 1915-16 his party introduced their legislation regarding leases, and that, on its rejection by the Council, the Government took the preliminary steps for its reference to the people which could have taken place in 1916. As they did not proceed with the reference, is it unfair to suggest that they distrusted the popular verdict on this measure of repudiation, or to hold, as I do, that by swamping the Council to secure its passage they have violated a fundamental democratic principle?

4. Mr. Theodore is entirely in error in attributing my views to distrust of Labour, whether in Queensland or elsewhere. The opinions which I have expressed in this case are merely an application of those set out in 1916 in my *Imperial Unity*, viz. that (1) relations of equality should be substituted for relations of superiority and dependence between the United Kingdom and the self-governing portions of the Empire; and (2) simultaneously there should be adopted the system of inter-Imperial arbitration for the settlement of divergences of view between different parts of the Empire which otherwise might weaken the bonds of Imperial unity. Such proposals, I conceive, are honourable to all parts of the Empire alike, and if the United Kingdom should propose arbitration, Queensland, I trust, would be slow to refuse it.<sup>1</sup>

## 6. SECOND CHAMBERS AS A CHECK ON LABOUR LEGISLATION

*To the Editor of THE SCOTSMAN, 22 May 1929.*

In the discussion of the failure of nationalization schemes in Queensland one point has, I think, failed to receive due emphasis. The errors of the Labour administrations would have

<sup>1</sup> In view of Mr. Theodore's refusal, no formal suggestion of arbitration was made by the British Government, but Mr. Theodore found it impossible to obtain a loan on the London market on acceptable terms. The reopening of the London market to Queensland borrowing was postponed until the difficulties regarding the lease-holders and the tramway company had been adjusted later on a satisfactory basis

been far less serious had they been subject to the control of an Upper House. But the Legislative Council, being nominee, was first swamped and then induced to consent to its abolition, with the result that Ministers had nothing to aid them in opposing pressure from the rank and file of the party, even if they desired to do so. It is significant that the leaders of Socialist thought are steadfastly opposed to the existence of any second chamber in this country with any effective powers.

In Western Australia Labour has been saved from some of the mistakes of Queensland by the wise intervention of the elected Upper House. Yet, as Sir James Mitchell pointed out in the Council in December, State trading has on the whole been disastrous; as against profits on the State sawmills of £238,075, on brickworks of £22,820, on hotels of £93,691, and on ferries of £30,128, must be set losses on shipping of £464,000, on implement works of £156,000, and on meat works of £743,000. The Minister for Works candidly admitted that the implement works had not been a success, and proposed to remedy the situation by the State going into partnership with the Westralian Farmers Ltd. It is not surprising that the Council rejected this proposal to help the trade of one company at the cost of its competitors.

Without going into the vexed issues of the Grand Trunk Railway question, I may point out that the decision of the Privy Council referred to by a correspondent in your issue of to-day is not a pronouncement on the merits of the action of the Canadian Parliament and Government, but on a technical legal issue, and therefore is irrelevant to the question of justice. To determine that point it would be necessary to consider whether the treatment accorded by the Government to the railway prior to the Act of 1919 was equitable, and whether the terms of that measure were just. Parliaments, we may hope, as a rule are not deliberately unjust, but it was a Canadian judge<sup>1</sup> who said, 'The prohibition "Thou shalt not steal"

<sup>1</sup> *Florence Mining Co. v. Cobalt Lake Mining Co.* (1909), 18 Ontario L.R. 275, 279, *per* Riddell, J.

has no legal validity upon the sovereign body', and the moral authority of a majority decision of arbitrators is greatly weakened when the minority consists of so eminent and so impartial a lawyer as in this case.

## 7. NEW SOUTH WALES: THE ATTEMPT TO ABOLISH THE UPPER HOUSE

*To the Editor of THE MORNING POST, 13 March 1926.*

The attempt to abolish the Upper House in New South Wales imposes a very serious burden on the Governor of the State. There can be no doubt of the legal power of the Parliament by simple act to abolish the Council; that was decided once for all in the case of Queensland, nor can it be denied that the Labour party has clearly enough in the past indicated its intention of abolishing the Council, if it had the power to do so.

But the Governor is clearly entitled according to all precedent to decide whether he has the support of the majority of the people of the State in resisting the abolition. If after the large concession of additional members already made he remains firm, and refuses to add further members to the Council, the Premier can resign, in which case the Governor must find another Premier to whom he will have to give a dissolution in order to test the will of the people. Or the Premier can advise a dissolution with the same result. But in no case is the Premier entitled to ask the Secretary of State to override the Governor, and it is a matter for satisfaction that Mr. Amery appears to have remained impervious to suggestions of intervention.

No Imperial interests are involved, and the principles of responsible government as understood in the Dominions ought to be allowed the fullest play. It is, of course, clear that under present circumstances the Upper House is quite unsatisfactory in point of constitution, but that is not to say that a great State like New South Wales with large powers would be well advised rely on a single chamber.



## 8. THE CONSTITUTIONAL ISSUE IN NEW SOUTH WALES

*To the Editor of THE SCOTSMAN, 16 November 1926.*

The question at issue between the Premier and the Governor of New South Wales must, as you say, be regarded from the point of view of constitutional usage, and on that ground I cannot find any justification for Mr. Lang's action. Lord Byng's error<sup>1</sup> lay in seeking to effect an innovation in Canadian public life, the refusal of a dissolution to a Prime Minister who assured him—correctly as it proved—that the step was essential in the interests of the country. Mr. Lang is equally an innovator when he seeks to establish the duty of a Governor to take steps to destroy an Upper Chamber at the bidding of an insignificant majority of the Lower House. For such a position no parallel exists in the history of the Dominions. In point of fact the Governor took a somewhat extreme step when he granted an addition of 25 members to the Council, and it appears clear that, when he did so, he was led to believe that it was not the intention of the Government to use these members to abolish the Council, but merely to carry by their votes the measures which the Upper House had declined to accept.

It is clear that the people of the State alone can properly decide the issue, and that Mr. Amery ought not to consent to remove the Governor and thus deprive them of the decision. Mr. Lang has it in his own power either to advise a dissolution forthwith on the issue if he thinks it vital, or to promote the passing of an Act for a referendum, which he commands enough votes in the Upper House to secure. In either way a decision of the electorate can be effectively procured, and at the same time due regard be paid to the essential principles of constitutional government.

<sup>1</sup> See I, Nos. 38, 39, and 43.

## 9. NEW SOUTH WALES POLITICS

*To the Editor of THE SCOTSMAN, 3 March 1927.*

As the Governor of New South Wales is precluded from defending his action in the matter of additional appointments to the Legislative Council, I should be glad to be permitted to comment on the Attorney-General's attack reported in your issue of to-day. Mr. McTiernan suggests that the Governor is acting unconstitutionally in refusing to add any further members to the Council during the lifetime of the present Parliament, and is enabling a nominee body to defeat the policy of family endowment for which the Government has a mandate, and he invokes the resolution as to the status of the Governors-General of the Dominions passed by the Imperial Conference in support of his contention. He must, however, be perfectly well aware that the Conference never attempted to deal with the position of the Governors of the States, a matter which owing to its composition lay entirely outside its province, and the mention of this resolution is wholly unfair to the Governor.

Mr. McTiernan also ignores the real meaning of the Governor's refusal. It is perfectly plain that any further addition of members would be followed by a renewed effort to abolish the Council, just as the Governor's earlier grant of an addition of twenty-five members was immediately taken advantage of to seek to abolish the Council. Can it fairly be contended that the Governor has any right to take a step ending in the destruction of the Upper House on the strength of the request of a Government, which has just recovered from a severe internal crisis and counts only 46 members in a house of 90 in the Legislative Assembly? Even assuming that British practice should be applicable, would any one in analogous circumstances expect the King to swamp the House of Lords? The Governor, most properly, holds that there must be a vote of the electorate before the Upper House can be abolished. Parliament has a

maximum duration of three years and was elected in June 1925, but, if the Government thinks even a year too long to wait, it can advise an immediate dissolution, and the Governor would doubtless gladly accord it, for all that he has asked is that the people should be allowed to decide a matter vitally affecting them. His attitude has brought him into serious disfavour with the Labour party, but it deserves the fullest sympathy and support, as it is based on the fundamental principle of democracy, that changes of substance in the Constitution should only be carried out after they have been definitely and distinctly made the subject of a general election.

#### 10. NEW SOUTH WALES: THE GOVERNOR AND HIS MINISTERS

*To the Editor of THE TIMES, 7 July 1931.*

There are two possible solutions of the disagreement between the Governor of New South Wales and his Ministers. The Secretary of State for the Dominions may secure an alteration of the Royal Instructions to the Governor giving effect to the demand of the Ministers that the Government should act invariably as advised by the Ministry. This would, of course, constitute an important alteration of the Constitution of the State, and it would be extremely difficult for the Secretary of State thus to intervene on the request of a single party in New South Wales.

The other course is simple and normal. Mr. Lang is in a position in which he can legitimately ask the Governor for a dissolution to test the will of the electorate on the issues in dispute; or he can resign, in which case his successor in office will doubtless have to advise a dissolution. In either event the electorate will be given the opportunity of definite decision, which is obviously a far more constitutional procedure than an appeal to the Secretary of State to secure an alteration in the Constitution of the State.

## 11. NEW SOUTH WALES

*To the Editor of THE TIMES, 9 July 1931.*

I regret that my intervention should have induced Mr. Lang to depart so widely from his customary decorum.<sup>1</sup> But I should explain that my letter of July 7 (in *The Times* of July 8) was elicited by representations from a correspondent in Sydney that the Ministry was using passages of my writings against the attitude of the Governor, as was done by Mr. Lang's Government against Sir Dudley de Chair. This interpretation of my views was so unsound that I felt in fairness to the Governor that I should disclaim it.

In conferring on me a non-existent title of honour, Mr. Lang departs sadly from the principles of his party, and his other epithet inevitably provokes from one interested in New South Wales stock the reminder that persons who live in glass houses should not throw stones.

12. THE GOVERNOR AND THE PREMIER OF  
NEW SOUTH WALES

*To the Editor of THE SCOTSMAN, 4 February 1932.*

While nothing can excuse Mr. Lang's attitude in repudiating payment of interest on part of the loans of the State, I regret that Sir Harrison Moore should have lent his authority to the suggestion that it would be constitutional, and indeed proper, for the Governor of New South Wales to exercise the Royal prerogative to dismiss his Ministry. The Crown, no doubt, is interested in the maintenance of the spirit of the Federal Union, but that does not conclude the matter. The question is whether the Governor in this matter has such a right or obligation as is suggested. There is nothing in the Constitution to bear this out, and, on the contrary, the principle of the Con-

<sup>1</sup> Mr. Lang in the Legislative Assembly attacked the writer on the score *inter alia* of depreciating the credit of the State, using rather unparliamentary language.

stitution runs counter to the idea that the Governors should be treated as in any sense agencies of the Federal power. The Constitution, on the other hand, supplies adequate authority to meet the situation. Under the judicial authority it is open to the Courts to give judgement against the defaulting State, if such default is judicially established, and when such judgement is given there exists abundant power under the Constitution to secure the carrying out of the Court's decision. In these circumstances, action by the Governor would be capable of being regarded as the usurpation of a function not properly his.

No doubt on principle a Governor may dismiss a Ministry which has ceased to represent the people, and which is bringing discredit on the name of the State. But the responsibility is a grave one; a general election must follow, and at it on the constitutional issue it might be possible to rally support for the late Ministry from voters who would not on a clear issue homologate repudiation. It is far wiser, in all probability, to let matters take their normal course, and to leave it to the electorate, when Mr. Lang is compelled to face it, to record its verdict on a course of action happily without precedent in the history of responsible government in the Dominions.

### 13. THE FINANCIAL AGREEMENTS ENFORCEMENT BILL OF THE COMMONWEALTH

*To AUSTRALIAN PRESS, 19 February 1932.*

If the principles of constitutional interpretation which are applied by the Privy Council are applied to the Financial Agreements Enforcement Bill of the Commonwealth, it would appear that the principle of the Bill would be held valid. The amendment of the Constitution to give power to deal with the financial agreement with the States authorized the Commonwealth Parliament to make laws for the carrying out by the parties thereto of the agreement, and it is natural to hold that these terms are sufficiently wide to cover the procedure proposed in the Bill. If a subject-matter is within the power of a

Parliament, the mode of exercise of that power is held by the Privy Council to be determinable by the Parliament within the widest limits. The validity of the new measure will, of course, fall to be determined by the High Court and not by the Privy Council, and the jurisprudence of that Court is less clearly ascertained than that of the Privy Council, and there are obviously certain possible grounds of attack on the validity in principle and detail of the measure. But, judging from the more recent decisions of the Court, it would appear *prima facie* probable that its validity would be upheld, though it is most unfortunate that such a measure should have become necessary, both on constitutional grounds and in the interests of the good name of Australia.

#### 14. THE EFFECT OF THE ACT ON THE PREMIER'S POSITION

*To the Editor of THE SCOTSMAN, 14 April 1932.*

The decision of the High Court<sup>1</sup> in favour of the validity of the Financial Agreements Enforcement Act of the Commonwealth Parliament has added greatly to the difficulty of the position of the Governor of New South Wales. Hitherto, no doubt, Mr. Lang has been able to allege that his actions, however irregular, might be made out to be within the law, and a Governor cannot claim to be able to reject the opinion of the legal advisers of the Ministry. The High Court's ruling, however, renders it impossible any longer to deny that Mr. Lang is violating the Constitution, and the Governor has now to face the issue how far he can acquiesce in the violation of a law whose authority, as a representative of the Crown, he is under a clear duty to uphold.

The events in New South Wales, like those in the Irish Free State, are a striking reminder of the difficulties of working responsible government if Ministries are determined to ignore legal obligations. The dispatch of a British war vessel to

<sup>1</sup> See Keith, *Journ. Comp. Leg.* xv. 118 f.

Newfoundland illustrates another side of the responsibilities of a Governor. It is clear that it is the elementary duty of a Dominion Government to maintain order locally by its own authority; when it has to seek the aid of Imperial forces the Ministry places itself in a position in which it cannot claim exemption from a measure of control by the Governor. If the Imperial Government has to intervene to prevent the possibility of overthrow of constituted authority by mob violence, it is bound, through the Governor, to seek such a reorganization of the Ministry as shall remove the risk of further manifestations of popular displeasure with a discredited Administration, and the sooner this is accomplished the better in the interests of Newfoundland.

### 15. THE CONSTITUTIONAL POWERS OF THE GOVERNOR

*To AUSTRALIAN PRESS, 14 April 1932.*

The decision of the High Court as to the validity of the Financial Agreements Enforcement Act is final in the absence of a certificate from that Court that the matter is one suitable for determination by the King in Council. It has repeatedly been laid down that matters of the powers of the Commonwealth and the States *inter se* must be disposed of in Australia, and the Privy Council has no power and no desire to intervene in such issues. The High Court decision therefore determines finally the validity of the Act which under s. 5 of the Commonwealth of Australia Constitution Act, 1900, is now binding on the Courts, judges, and people of every State notwithstanding anything in the laws of any State. Mr. Lang's attitude therefore is a deliberate defiance and a misuse of the governmental powers of the State in an endeavour to defeat the provisions of the Commonwealth Constitution.

Hitherto in his actions, both in respect of the internal affairs of the State and its relation to the Commonwealth, Mr. Lang no doubt has been able to allege that he has acted without

actual illegality, or at least that his measures might possibly be defended as being within the law to such a degree that he could induce his legal advisers to claim that his action was not illegal. But, in face of the decision of the High Court, it is plain that this excuse is no longer available, and the Governor's position towards Mr. Lang has been made far more delicate than it has hitherto been. The Governor is normally entitled to accept the Premier's statement of the legal position if fortified by a formal legal opinion; but he cannot disregard the law of the land when finally declared by the High Court, and it is his right and indeed his duty to refuse to be party to any illegal action of the Premier and to decline assent to any Order in Council which in substance is illegal. Moreover, he will be under the obligation of considering most seriously whether it will be possible for him to leave Mr. Lang the authority of the Premier's office in order to defy the law of the Constitution. While the difficulty of the Governor's position must be fully recognized, it is clear that the paramount duty of the King's representative is to carry out the law of the Constitution, and that he is entitled to demand from Mr. Lang obedience to that law, and in the event of refusal of the demand to exercise his constitutional power of removal. It may be hoped that on mature consideration Mr. Lang will accept the ruling of the High Court and conform his action to the law of Australia.

#### 16. THE DUTY OF THE GOVERNOR TO VINDICATE THE LAW

*To AUSTRALIAN PRESS, 13 May 1932.*

The attitude of the Premier of New South Wales towards the Commonwealth Government and High Court has assumed the definite form of deliberate defiance. The Premier was doubtless entitled to contest the validity of the Commonwealth legislation to enforce the financial agreement in the Courts, but once a decision contrary to his contentions was delivered, he was under an absolute obligation to obey the law of the Commonwealth. Instead of accepting the law of



the land, he has attacked the impartiality of the High Court and made successive efforts to defeat the methods adopted by the Commonwealth to enforce performance of the duties of the State. He has accused the rest of Australia of attacking the State, and his proposed taxation of mortgages is clearly motivated by the desire to inflict the maximum of loss on his political opponents in the State. In these circumstances it would have been impossible for the Governor to justify acquiescence in the continued tenure of office by the Premier; the Governor is under a clear obligation to secure the observance of the law of the Commonwealth, and, if his Premier refused to obey that law, the Governor would have incurred personal responsibility had he failed to take action. Moreover, it is essential that the people of New South Wales shall have the opportunity of deciding whether they desire to remain within the Commonwealth and the Empire. The British Government has intimated in connexion with the Irish Free State that it cannot at Ottawa enter into commercial agreements with a part of the Empire which has violated an agreement, and clearly, if New South Wales is determined to repudiate its indebtedness, it cannot expect to share the advantages for its exports which would normally result from the Ottawa Conference.

In the circumstances it is clear that the Premier ought to have advised the reference of these issues to the people, and that he has acted unconstitutionally in compelling the Governor to intervene in order to secure to the people their right of deciding their destiny both as regards the Commonwealth and the Empire.

#### 17. THE PROPRIETY OF THE GOVERNOR'S ACTION

*To the Editor of THE SCOTSMAN, 14 May 1932.*

Cordial recognition is due to the Governor of New South Wales for the great ability with which he has acted during

the difficult position which has so long prevailed in the State. For months he has been subjected to pressure from the forces opposing Mr. Lang to force the resignation of that Minister, but he has deferred action until he was not merely entitled, but constitutionally and legally bound, to intervene. So long as Mr. Lang kept within the limits of the law, it would have been unwise for the Governor to act against his advice. But, when Mr. Lang deliberately defied the legislation of the High Commonwealth after it had been declared valid by the Court, and continued to issue illegal orders to the servants of the Crown, the Governor had no alternative but to require him to withdraw these orders, and, on his refusal to do so, to remove him from office. If he had failed thus to act, he would have implicated himself in the illegalities of the Minister, for the law of the Commonwealth binds the Governor no less than the Ministry and people of the State.

There is, of course, another reason rendering an election essential. The British Government has intimated that at Ottawa it cannot enter into agreements with a part of the Empire which has repudiated an existing agreement. Clearly, if the people of New South Wales are determined to break their obligations towards holders of their governmental securities, they cannot expect to be included in the scope of tariff advantages given to the rest of Australia. The election now to be fought is vital to determine whether New South Wales desires to remain effectively linked not merely to the Commonwealth, but also to the Empire as a whole.<sup>1</sup>

## 18. THE KING'S MINISTERS IN MALTA

*To LORD STRICKLAND, 20 May 1929.*

I have your letter of the 15th instant and have not the slightest doubt that the Ministers in Malta are properly to be described as the King's Ministers in Malta. I cannot indeed

<sup>1</sup> The election gave a decisive majority to the new Government, which has secured legislation held valid by the Privy Council under which the Upper House is elected by the members of the two Houses.

understand on what ground this appellation could be questioned. The executive power in Malta is, of course, vested in the King, and the position of Ministers as His Majesty's Ministers is emphasized by the Letters Patent themselves. Clause 54 (2) deliberately compels the Governor to appoint in the name of the King and even provides that the offices shall be held at the King's pleasure, though in Canada, the Commonwealth, and the Union tenure is at the pleasure of the Governor-General. It may be added that the Letters Patent are careful to require by clause 41 enactment of laws in the name of the King, no doubt as part of the purpose to show that the responsible government system of Malta is essentially of the normal type, despite the limitations within which it works. The Governor will naturally refer to Ministers as 'my Ministers' as is still the practice in the Dominions, and there can be no objection to describing the Ministers as 'the Governor's Ministers'. But 'Ministers of the Maltese Government' appears to me to be an impossible description and wholly unwarranted.

Ministers are Ministers of the Crown carrying on functions in respect of the government of Malta, just as British Ministers are Ministers of the Crown carrying on functions in respect of the government of the United Kingdom.

#### 19. THE VALIDITY OF LAWS PASSED BY THE JOINT SITTINGS OF THE PARLIAMENT OF MALTA

(OPINION, 20 *February* 1930.)

I have had the advantage of perusing the opinion of Sir Thomas Inskip dated February 6, 1930, on the validity of Malta Act No. 1 of 1929. With all deference to the views of so distinguished a lawyer, I must express my unhesitating opinion that the analogy which he has drawn between the Parliament of Malta and a corporation created by Charter, or by or under an Act of Parliament, is wholly invalid and runs counter to all authority. It ignores the fundamental

fact that, as the Judicial Committee of the Privy Council has repeatedly laid down, a Colonial Legislature does not possess a delegated power. It has, subject to limitations imposed by Imperial Act, powers of legislation as large and of the same nature as those of Parliament itself. The extent of that authority can be seen by reference to *Hodge v. Reg.* (1883), 9 App. Cas. 117; *Powell v. Apollo Candle Co.* (1885), 10 App. Cas. 282, which have been consistently followed by the Courts, and to the case of *Reg. v. Burah* (1878), 3 App. Cas. 889, where the same doctrine was applied even to the non-representative Indian legislature. Moreover, it has expressly been laid down in the case of *Stoman v. Governor and Government of New Zealand* (1876), 1 C.P.D. 563, that a Colonial Government is not a corporation and cannot effectively be served with a writ, nor will an order for substituted service be made. (Compare Dicey and Keith, *Conflict of Laws* (ed. 4), pp. 208, 209.)

There are, of course, instances of colonies which were created as corporations on the English model by Royal Charter inserting express provisions to this effect, such as Massachusetts Bay, Rhode Island, and Connecticut, but these forms of government were admittedly imperfect, and they passed away at the American Revolution. It is, however, instructive to note that, during the existence of these Constitutions, the only ground on which any law was annulled by the Privy Council was that of repugnancy to the law of England, although it is undisputed that laws were frequently passed by Legislatures improperly elected. This illustrates the fundamental rule that it is not the function of the judiciary, except by express delegation of authority, to attempt to control the composition of legislative bodies, a matter which is essentially a part of the privilege of such bodies.

I agree, of course, that any attempt of the Maltese Parliament to exercise powers which are not conferred upon it would be *ultra vires*, but this doctrine, as evidenced by the case cited, *Attorney-General for the Commonwealth of Australia v. Colonial Sugar Refining Co. Ltd.*, [1914] A.C. 237, and by all the other

cases which are adduced in the text-books, has reference to the substance of the legislation, not to the issue, which alone is here in question, of the regularity of the constitution of the Legislature by which the legislation was passed. It is extremely difficult to believe that, if it had been competent to challenge legislation on such a ground, such action should not have been on record.<sup>1</sup>

## 20. THE MALTA COMMISSION

*To the Editor of THE SCOTSMAN, 13 February 1932.*

It is impossible to regard with much satisfaction the result of the prolonged meditations of the Royal Commission on Malta. The essential result of their findings is that responsible government should forthwith be restored to the island, but they fail to produce any satisfactory evidence to show that the cause which brought about its suspension has been eradicated. They can only say that after conversations with the Bishops they feel sure that any new pastoral which may be issued will differ from that of 1930, which rendered it impossible for the election then pending to take place. This is wholly inadequate; it in no way binds the Bishops, still less the Holy See, and, if as a matter of conscience the Bishops feel bound to repeat even if less emphatically their warnings of 1930, the result must be fatal to the Constitutional party. If the Government acts on the advice now given, it is simply placing itself at the mercy of the Bishops, who can perfectly justly say that they cannot be bound by any views of their intentions formed by the Commission, or that the

<sup>1</sup> The issue here raised was created by the decision of the Maltese Court that two of the Senators were not duly appointed, and the ruling of the Privy Council in *Strickland v. Grima* ([1930] A.C. 283) that no appeal lay in such a case. An amendment to the Constitution regarding the relations of the two Houses had been passed at a Joint Session with the use of the votes of these Senators, and the question arose whether this amendment and all laws enacted under its provisions were not void. Sir T. Inskip's opinion of Feb. 6, 1930 (published in Malta), held that a distinction must be drawn between an Act of the British Parliament and an Act of the Parliament of Malta.

attitude of their opponents has forced them to alter their views.<sup>1</sup>

The Commission again is prepared to proceed with the restoration of the Constitution without the passage of an Imperial Act to define the validity of the legislation of the Parliament and of the Crown in Council which has been impugned by the Court of Appeal, and the validity of which was denied by the representatives of the Nationalist party. It is perfectly clear that the British Government is under an obligation to legislate to determine absolutely the validity of all measures assented to by the Crown, or enacted by its authority; unless this is done, the result can only be chaotic. Moreover, the Commission has failed absolutely to suggest any remedy for a glaring flaw in the Constitution—the absence of any impartial tribunal to deal with election petitions. The Privy Council, after three months' consideration, has decided that it cannot hear appeals in these cases, and it is significant that the Commission has not been able to deny that there is ground for the feeling of the Constitutional party that justice cannot be expected from the Court of Appeal in this matter. No settlement can be satisfactory which does not secure that issues of this kind are handled impartially.

One service the Commission has rendered: it has made it clear beyond question that under the Nationalist régime the spirit, if not the letter, of the Constitution has been violated as regards the position of the English language. The University, which represents the views of that party, has insisted on lectures being delivered in Italian only, and Act IX of 1923, by enforcing instruction *pari passu* in English and Italian, not only in secondary but also in elementary schools, has prevented children in these schools acquiring any useful knowledge of either English or Italian. This has been done in the face of the Constitution, which expressly forbids legislation or administration which shall tend to restrict the use of English

<sup>1</sup> This prediction was fully verified at the elections, which were controlled by clerical influence.

in education. When choice was permitted to parents, as for twenty-one years before 1923, 97 per cent. had the good sense to choose English, which for all practical purposes is of infinitely greater value to the Maltese than Italian. The facts dispose for good of the denial of the desire of the Nationalist party to favour Italian at the expense of English.

## 21. ELECTIONS IN MALTA

*To the Editor of THE TIMES, 21 May 1932.*

It seems often to be forgotten that Canada between 1875 and 1878 was confronted by much the same problem as is Malta to-day. It was solved partly by the wise intervention of the Pope, but partly by a factor whose operation is unhappily denied in the case of Malta. In the crucial instance of the petition brought against the election of Langevin the Quebec Court held that a candidate might use clerical influence to secure his election without contravening the law. Had this judgement stood it is impossible to say how far the matter would have been carried, but happily appeal lay to the Supreme Court of Canada, a tribunal not under Roman Catholic influence in the sense that was the Quebec Court. In Malta, unhappily, the Constitution gives the final decision of electoral petitions to the local tribunal, denying an appeal to an impartial body such as is the Privy Council. For this error it seems impossible to excuse wholly the Imperial Government, to which, of course, the Canadian parallel must have been present.

## 22. THE TROUBLES IN MALTA

*To the Editor of THE SCOTSMAN, 2 November 1933.*

Events in Malta demonstrate the complete inability of the Royal Commission and the British Government to foresee the necessary outcome of the policy which has been followed.<sup>1</sup>

<sup>1</sup> The Constitution of Malta had to be suspended in operation and all legislative power vested in the Governor.

We were assured that the Roman Catholic hierarchy would not use their control of the people to destroy Lord Strickland's party; in fact, by exercise of their spiritual power they gave a sweeping victory to the Nationalists at the expense of the Government, which, for the first time in Maltese history, had favoured the Maltese language and promoted the interests of the workers as opposed to those of the Italian intelligentsia. We were assured, further, that the intelligentsia were loyal to the British connexion. Since attaining power, they have worked indefatigably to defy the Constitution, and to force on the children of Malta the study of Italian in addition to English and Maltese, though knowledge of Italian is of infinitely less value to the Maltese than knowledge of their mother tongue or English. It is, of course, absurd to expect loyalty; the Italians are linked to Italy by race, culture, tradition, and language, and the one thing which separated them, the treatment of the Pope by Italy, has disappeared with the concord attained under the Fascist régime. That they should share the ideals of Italy and contemplate the possibility of Malta becoming Italian is perfectly natural, however diplomatic it may be for their leaders to deny the fact.

Great significance attaches to the fact that the British Government, despite its acceptance for India of the unquestionably sound doctrine that responsible government is impossible without control of the police, has already had to deprive the responsible Government of Malta of its authority in this regard. Malta is strongly garrisoned by British troops, and is a naval base; yet, in face of this overwhelming force, the Maltese Government has evidently been able to use its authority over the police in such a manner as to demand the taking of power into British hands.

The assurances given to us that restricted self-government was workable have been abundantly disproved for Malta. For India they have still less cogency. Doubtless matters have been carried so far by the present Government that surrender of power there is inevitable, and in these circumstances the



pretended safeguards will serve no purpose save that of deluding into false security those who believe in them, and destroying the once chance of success in the experiment, which would be afforded by reposing complete confidence in the willingness of the Indian people to afford just treatment to British officials, commerce, and investors in return for the grant of full autonomy.

### 23. THE STATUS OF NEWFOUNDLAND

*To the Editor of CANADA, 18 October 1924.*

The Prime Minister of Newfoundland is certainly mistaken in his assertion, cited in your issue of this date, that the status of the Island is that of a colony, unless this utterance is interpreted in the narrowest legal sense. Newfoundland, it is true, is legally a colony in view of s. 18 (3) of the Interpretation Act, 1889, but the same statement applies to the Dominion of Canada, the Commonwealth of Australia, the Union of South Africa, and the Dominion of New Zealand, and therefore this fact has no decisive bearing on the status of the Island. That status does not depend on the view of the Colonial Office, but on the decision taken by the Colonial Conference of 1907, which determined to alter its nomenclature to that of 'Imperial Conference', and to style the territories other than the United Kingdom represented at it 'self-governing Dominions', or, more briefly, 'Dominions'. That resolution has never been rescinded, and the status acquired by Newfoundland as one of the Dominions cannot be varied except by the agreement of an Imperial Conference.

Until 1919 Newfoundland enjoyed in every respect full equality with the other Dominions, but by the decision to secure membership of the League of Nations for the four great Dominions alone, Newfoundland received as regards international relations a definitely inferior position to those Dominions, as was of course inevitable having regard to her size and population. But in all other questions Newfoundland

remains possessed of the full position of a self-governing Dominion, a term applied to her in British Acts of Parliament such as the Copyright Act, 1911. The correct title of the Island is either Newfoundland or Island of Newfoundland and its Dependencies, though both Colony of Newfoundland and Dominion of Newfoundland appear to have some official currency.

#### 24. GREAT BRITAIN AND NEWFOUNDLAND

*To the Editor of THE SCOTSMAN, 15 December 1933.*

The Dominions Under-Secretary's reason for refusing Mr. Maxton's proposal for a plebiscite on the Newfoundland Constitution<sup>1</sup> suggests that he desires to vie with his chief in ignorance of constitutional law.

(1) Ever since 1866 it has been established constitutional law (a) that no Government or Legislature can hand over to the British Government and Parliament the duties with which it has been entrusted without the concurrence of the British Government and Parliament, and (b) that the latter have the right to impose such conditions as they think fit on the surrender. It is clearly incumbent on the British Government, before any proposal is made to Parliament, to satisfy itself that the proposal made from Newfoundland represents the wishes of the people. To say that it is constitutionally within the powers of the Newfoundland Government and Legislature to decide whether or not a plebiscite should be taken on the present issue, and that the British Government or Parliament could not demand one, is, accordingly, an indefensible position. Moreover, its absurdity becomes patent when it is remembered that the present Government in Newfoundland never suggested to the electorate that it proposed

<sup>1</sup> See *Journal of Comparative Legislation*, xvi. 25-39. The Constitution is suspended under the Newfoundland Act, 1933, and legislation is effected by the Governor and a Commission, controlled by the Secretary of State for Dominion Affairs.

to surrender self-government, and that it has not a shadow of a mandate for this purpose.

(2) The only excuse, in fact, for dispensing with a consultation of the people, either by an election or a plebiscite, rests on the belief that the British grants of £2,000,000 up to 1936, and indefinite sums thereafter, are sufficient to secure general assent, and to render unnecessary the serious difficulties of either an election or a plebiscite at this time. Petitions against the proposal seem not to be forthcoming, and, if this is so, action is probably constitutionally justified, but on this ground only, not on the proposition alleged by the spokesman of the Government, which would give a chance majority in a Dominion Legislature the right to surrender the self-government of the Dominion with utter disregard of the public.

(3) It is not surprising that Mr. Thomas evaded answering Mr. Mander's request for a statement of the case against the union of Newfoundland with Canada. The present *débâcle* has been rendered possible only by the existence of too wide powers in the hands of a poorly educated and economically dependent electorate, and, as a province of Canada, Newfoundland would not have been able to ruin herself by reckless borrowing, nor would the issue of default on trustee securities have arisen. It is most unfortunate that, as in 1895, financial difficulties in Canada have caused the Dominion Government to miss the chance of completing a union which seemed in 1867 to be assured at an early date. Much as one sympathizes with Newfoundland's preference for autonomy, in view of the doubt whether the country is capable of wise use of its freedom it may be hoped that in the next few years the question of uniting Newfoundland with the Dominion may be carefully explored. In any case, it seems incredible that Newfoundland will ever be capable of developing Labrador.

(4) Mr. Thomas has once more, unhappily, emphasized the view that the Commonwealth consists of discrete units, and that the Dominions are not vitally concerned with what happens to Dominion status. This attitude, of course, is a

negation of the doctrine of inter-Imperial consultation and of the vital unity of the Commonwealth, and tells directly in favour of the advocates of the rights of neutrality and secession. If British action in the case of Newfoundland is as fully justified as *prima facie* it seems to be, consultation of the Dominions should surely have evoked their approval and sympathy. It may be, however, that the indefinite suspension, leaving to the British authorities the sole power of determining on resumption of local authority, has aroused Dominion criticism, and unquestionably it is the weakest feature of the proposal.

## 25. THE AWARD OF HONOURS: HEREDITARY TITLES IN THE DOMINIONS

*To the Editor of THE TIMES, 28 April 1919.*

Several distinct issues are raised by the controversy in Canada<sup>1</sup> on the question of honours, which has caused some embarrassment both to the Imperial and Dominion Governments.

In the first place, it should be made clear whether or not the bestowal of peerages on residents in Canada, which was the immediate cause of the outbreak of popular feeling in the Dominion, had the approval of the Prime Minister of Canada. If Sir R. Borden gave his assent to the creations, it is only fair that he should accept the burden of responsibility, which at present appears to be cast upon the Imperial Government.

In the second place, it has been obvious since 1911 at least that the overwhelming weight of democratic opinion in Canada, Australia, and New Zealand is firmly opposed to any attempt to create in these Dominions a class of persons holding hereditary titles, and, in so far as Dominion Governments

<sup>1</sup> At the wish of the House of Commons expressed by resolution no honours were conferred on persons domiciled or ordinarily resident in Canada from 1919 to 1934, when recommendations were again made to the Crown by the Prime Minister. His action was taken without obtaining a rescission of the address to the Crown of 1919, and must be regarded as contrary to the spirit of the Constitution.

have not given effect in their recommendations for honours to this feeling, their action may not unfairly be attributed to the fact that, under the existing system of the award of honours, responsibility has been so vaguely distributed between the Dominion and the Imperial Governments that the former have been able to evade accepting their full measure of accountability. The remedy for this position is clear: the question should definitely be brought before the next meeting of the Imperial Conference, and the discussion and its result made public. There is no need of mystery as regards the relation of the Imperial and Dominion Governments in this matter.

Thirdly, the time has surely come, since the recognition of the national status of the Dominions, to accept the principle that no honour of any kind should be conferred on any person normally resident in a Dominion save on the recommendation or with the assent of the Government of the Dominion.<sup>1</sup> No other position is compatible with the self-respect of the Dominions, and no logical argument can be adduced against the proposal. As the honours would still remain Imperial, it would still rest with the British Government of the day to fix the proportional share of distinctions to be allotted to the Dominions; but the entire responsibility for the selection of recipients would rest with the Governments of the Dominions, normally, no doubt, with the Prime Minister. Such an arrangement would certainly be acceptable to Canada, and at the next Imperial Conference it might well be adopted for the whole of the Dominions.

## 26. THE DOMINIONS AND THE TITLES OF THE ROYAL FAMILY

*To AUSTRALIAN PRESS, 31 March 1927.*

In reply to the suggestion of the *Sydney Sun* that the Duke of York should be given the title 'Duke of York and Canberra',

<sup>1</sup> The Irish Constitution thus provides, and neither the Free State nor the Union secures the grant of honours to persons therein resident.

it is certainly within the Royal prerogative to confer the title 'Duke of Canberra' on the Duke of York. Such action would have to be based on the recommendation of the Commonwealth Government, with approval of Parliament and the concurrence of the British Government. So important a step could only be taken after consultation with other Dominions, and preferably as part of a scheme for the recognition of the Dominions and India in the styles of the royal family. Great practical difficulties and possibly rivalry between the Dominions might easily be encountered in the attempt to assign titles. It is extremely doubtful if such a proposal would meet with popular acceptance even in Canada or South Africa, and it would certainly not be welcomed in the Irish Free State. The King himself forms the essential bond of unity of all the Dominions, and it seems unwise to impair in any degree His Majesty's unique position in the fabric of the Empire.

## 27. THE RELATION OF THE COMMONWEALTH AND THE STATES AS REGARDS HONOURS

*To AUSTRALIAN PRESS, 4 January 1925.*

The protest of the Government of South Australia against the conferring of a knighthood on Mr. Gordon, on the recommendation of the Commonwealth Government against the wishes of the State Government, is natural; but the Commonwealth Government can hardly be said to have acted unconstitutionally in the matter.<sup>1</sup> The Commonwealth Constitution provides for the existence of the Commonwealth and State Governments, each with a definite sovereignty, and recommendations for honours in respect of State and Commonwealth services respectively appertain to the State and the Commonwealth, neither having any right of interference with the recommendations of the other. The Constitution, how-

<sup>1</sup> This comment was elicited by an inquiry regarding the propriety of the conferring of a knighthood on a former member of the Commonwealth Parliament, a resident of South Australia, to which exception had been taken by the State; see *The Times*, Jan. 2, 1925.

ever, can only work successfully by reason of co-operation and mutual consideration, and from this point of view the action of the Commonwealth in insisting on a recommendation in face of the wishes of the State Government may be regretted. The incident illustrates the advantages of the position adopted by Canada, under which honours are no longer conferred on persons resident therein.

## 28. BRITISH POLICY IN CEYLON

*To the Editor of THE SCOTSMAN, 31 July 1934.*

It is impossible not to view with considerable anxiety the departure from British policy involved in the decision to legislate by Order in Council, so as to regulate by quota the importation into Ceylon of foreign cotton and artificial silk piece goods. The Ceylon Ministry has refused to adopt this course, because they hold that it is contrary to the interests of the people of the island to lose the cheap imports which alone they can afford to buy, unless, indeed, the British Government is able to grant such additional preferences as will strengthen the economic position of their constituents, and enable them to pay higher prices and to purchase Lancashire goods. The weight of the contentions of the Ministry seems very great, and it seems most unfortunate that the Colonial Secretary appears to be unable to controvert their arguments by showing that his policy is really in the best interests of the people of Ceylon. It is, of course, irrelevant to appeal to the general advantages of Imperial Preference. The Ceylon Ministry is willing to exchange preferences; what it denies is the right of the Imperial Government to determine what is best for Ceylon.

The contrast with the governmental attitude in respect of Lancashire and India is glaring and difficult of explanation. We are told that only by conciliation can British exports be sold in India, and that legal safeguards will merely ensure the refusal of the people to consume goods from Lancashire. Why

is the same doctrine denied in the case of Ceylon? It would be deplorable if the reason were to be found in the orderly character of the methods employed in the past by the Ceylonese in order to obtain the concession of some measure of self-government. Surely that can form no moral justification for compelling the people of Ceylon to purchase goods from Lancashire, and reversing the honourable tradition of ruling the Colonies primarily in the interest of their people, and not for the profit of the United Kingdom.





V

INTERNATIONAL LAW AND THE CONFLICT  
OF LAWS



## INTERNATIONAL LAW

### 1. THE FUTURE OF THE GERMAN COLONIES

*To the Editor of THE SCOTSMAN, 11 March 1918.*

The importance of the principle involved in Mr. J. Boyd Kinnear's criticism in your issue of to-day of Mr. Asquith's attitude towards the disposal of the German colonies seems to render some reply desirable. In the first place, it cannot fairly be contended that the German acquisition of these territories is without the shadow of a right. Germany acquired them by methods which did not differ substantially from those adopted by the other nations concerned, and the gravamen of the charge against her is not that of unlawful acquisition but the fact that her rule has been based on the deliberate exploitation of the native population, and that she has in the case of East Africa deliberately planned the creation of a military organization which menaces the security of northern and southern Africa alike. It would, however, be clearly in flat contradiction of the principles for which the United Kingdom and the Dominions are contending in this war, if the right of conquest were set up as the ground for retaining the German colonies. Their disposal must, if it is not to be the seed of future wars, be determined by the Peace Conference, whose decision must be based on the consideration of the wishes and the interests of the native population and on the necessity of preventing the territories being used as a base of military or naval operations of an aggressive character. It is legitimate to hope that any conference would recognize that these principles required the recognition of the claim of the Union of South Africa to German South-West Africa, of Australasia to the German possessions in the Pacific, and of the United Kingdom and the Union to such arrangements in East Africa as would render it impossible for Germany to found an African empire. But mere retention by right of conquest, even if practicable, would afford no chance of lasting peace.

## 2. THE PEACE TERMS OF PRESIDENT WILSON

*To the Editor of THE SCOTSMAN, 30 September 1918.*

The importance of the peace terms proposed by the President of the United States may justify some comment on the questions discussed in your leader of this date. In the first place, it would seem that the President's speech on September 27 does definitely contemplate the inclusion of Germany in the League of Nations: his whole argument for the formation of such a League by the treaty of peace rests on the necessity of including Germany, and he demands the establishment of effective means to carry out the peace settlement, because he contemplates that Germany will be a member of the League. If this were not his view, his objection to the formation of the League before the treaty of peace would be without meaning.

In the second place, the President's terms do affect in one important aspect the Paris resolutions. They do not, I agree, touch upon the relations *inter se* of parts of one nationality, and therefore are not inconsistent either with the French policy of preserving to the metropolis the trade of her colonies, or with preference between the different parts of the British Dominions. Nor, of course, do they demand the adoption by any nation of merely revenue tariffs. On the other hand, it is impossible to deny that they do not permit of any differential treatment by one member of the League of Nations of another member. They demand that Germany should abandon her economic plans for the East, but they are equally inconsistent with any scheme for preference among members of the Western Alliance. Nor is this policy in any way surprising; it must be remembered that the present tariff of the United States is based on the principle of according the same treatment to all nations which do not differentiate against the United States. Whether, of course, this attitude is practicable or desirable may be open to question, but it seems impossible to read any other sense into the language of the President.

## 3. AMERICA AND ARMENIA

*To the Editor of THE SCOTSMAN, 1 November 1919.*

While lending your support in your issue of to-day to the ministerial criticisms of the reluctance of the United States to assume responsibility for any part of the Turkish dominions, you seem to contemplate that in the ultimate issue America will accept a mandate for Armenia, with or without Constantinople. Is there, however, any warrant for the assumption? The evidence available seems to me to show that, while in some form the Peace Treaty with the Covenant of the League of Nations may be approved, the Senate will never consent to the acceptance of a mandate, and that in this attitude it will have the support of the vast body of Americans.<sup>1</sup>

We may regret this attitude of the United States, but what moral right have we to censure it? The United Kingdom, France, Italy, and Russia, by secret treaties still withheld from the public, and communicated to the President only when in Paris, agreed to divide the Turkish dominions. These arrangements are now largely being carried out, with the admission of Greece to a share, and the omission of Russia. What inducement is there to the United States to accept a mandate for the territories which the Tsar claimed? Not only would large forces and much expenditure be required, but the United States would inevitably be inextricably involved in the most complicated and dangerous of European issues whence war with Russia or a Turkish rebellion might easily arise! Small wonder if American opinion lays stress on the fact that the European Powers have far more effective bases of operation, that they have already secured politically advantageous areas of mandate, and that the moral duty of providing for Constantinople and Armenia rests upon them, and not upon an extra-European Power, which has declined to seek any territorial advantages from the war.

<sup>1</sup> In fact, the United States after rejecting the Covenant of the League was offered and refused the mandate.

#### 4. DOMINION STATUS: NEW ZEALAND AND SAMOA

*To the Editor of THE TIMES, 22 October 1919.*

How little the fundamental change of the status of the Dominions as the result of the Peace Conference has been realized is shown clearly by the report in your issue of October 20, of Sir J. Allen's statement in the New Zealand Parliament that an Imperial Order in Council would enable New Zealand to legislate for the peace, order, and good government of Samoa. So long, indeed, as New Zealand was no more than a British Colony, such an Order in Council was necessary to enable the New Zealand Parliament to legislate for territories beyond the colonial limits, for the Judicial Committee of the Privy Council held—though not without protest from New Zealand Judges—that the power of a Colonial Legislature extended only, in the absence of express Imperial authority, to the territorial limits, including the territorial waters, of the Colony.

But New Zealand will hold Samoa in future only as a mandatory of the League of Nations, of which she is an original member, and not as a British Colony under an Imperial grant. The restrictions on the power of New Zealand would apply only to the colonial status, and with the disappearance of that status it may confidently be said that not merely the Courts of New Zealand, but the Judicial Committee itself would hold that the Dominion Parliament has of its own right full authority to legislate for Samoa. It may further be suggested that in its legislation for Samoa the Dominion Parliament is not subject to the Royal right of disallowance applicable to colonial enactments, and that no right of appeal to the Judicial Committee exists in respect of judgements rendered in Samoan Courts or in New Zealand Courts on appeals from Samoa.<sup>1</sup>

<sup>1</sup> See *Nelson v. Braisby*, [1934] N.Z.L.R. 559 and 636; *Journal of Comparative Legislation*, xvi. 295, 296.

There are other complex problems, of which General Smuts appears to be conscious, involved in the new régime. It is to be hoped that they are already occupying the most anxious consideration of His Majesty's Government, for on their just solution depends the effective maintenance of the Imperial unity revealed by the war.

## 5. SECRET NEGOTIATIONS AND TREATIES

*To the Editor of THE SCOTSMAN, 31 January 1920.*

It is with equal surprise and regret that I observe from your issue to-day that the Coalition candidate for Paisley defends the withholding from the public of secret negotiations and treaties affecting international affairs. I had hoped that the experiences of the war would have taught even the most convinced Conservative that every consideration of national security demanded that the public should have the fullest information on foreign policy, of which they should be the ultimate arbiters.

The outcome of the policy of secret negotiations and commitments is exemplified with sufficient clearness in the manifesto just issued by Mr. Clynes and others, in which they seek to lay down a foreign policy for the nation, and warn the Government that the Labour party will not, if in power during the next year or two, recognize as valid secret military or diplomatic commitments directed against the Bolshevik Government in Russia. Attempts of this kind by representatives of any sectional interest to dictate policy are unconstitutional and open to grave objection, but it cannot be denied that they are not merely inevitable, but also in some manner justified, so long as a Government seeks to commit the country to a line of policy in which it has not received the deliberate support of the House of Commons as representing the nation. If the electors of Paisley are wise, they will seek from the candidates who ask for their votes unqualified adherence to the only sound principle, that the nation is bound by no



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foreign commitments of any kind which have not been formally approved by the Parliament of the United Kingdom.

## 6. MESOPOTAMIAN OIL

*To the Editor of THE TIMES, 21 October 1920.*

The report that the State Department at Washington is far from favourably impressed by the British and French attitude on the question of Mesopotamian oil suggests an interesting point as to the meaning of Article 22 of the Covenant of the League of Nations. We have been assured by Lord Milner that the exploitation by the United Kingdom, Australia, and New Zealand of the phosphate deposits of Nauru is consistent with that Article on the plea that in the case of the South Pacific Islands the article provides merely respect for safeguards in the interest of the indigenous population, and that these safeguards do not include, as *prima facie* would seem to be the case, the 'equal opportunities for the trade and commerce of other members of the League' expressly specified in the case of Central African mandates. But Lord Milner's apologia was based on the fact that the provisions for the Pacific Islands and South-West Africa were a compromise between the desire of the Dominions for frank annexation and the United States support of the mandatory system, and has no application to the case of Mesopotamia. It appears therefore that it is impossible to deny the obligation of the mandatory for Mesopotamia to secure the régime of equal opportunities, whether the mandatory actually undertakes the administration or confines itself to administrative advice and assistance.

I am wholly unable to understand how the obligations imposed by the League Covenant are to be reconciled with the agreement regarding petroleum concluded on April 25 at San Remo between Mr. Lloyd George and M. Millerand, which appears to me to be open to all the criticisms adduced in the case of Nauru, while the reply then made by Lord Milner is inapplicable. For the British Government itself to

develop the Mesopotamian oil-field appears to be wholly incompatible with the obligations of a mandatory State as opposed to a State exercising a veiled annexation, and the manifest duty of the mandatory appears to be to advise the Mesopotamian administration that in the grant of concessions for oil strict impartiality must be observed between nationals of the State and members of the League. If it is contended that the British and French Governments are entitled to make use of the rights flowing to them from former Turkish concessions, the reply is simple; by agreeing to the terms of the League Covenant, they have precluded themselves from exercising in specie these rights when in conflict with the principles and terms of the Covenant, and have only a right to be reimbursed by the Mesopotamian State the amount of any expenditure actually incurred by them hitherto under the terms of the concessions.

The question is one of far more than theoretic interest; the deplorable waste of British and Indian lives—apart from the enormous expenditure involved in the pacification of Mesopotamia, is the more unjustifiable if it is incurred in the pursuit of a policy which, persisted in, will endanger Anglo-American relations,<sup>1</sup> and ruin all belief in the honesty of the mandatory system.

## 7. THE LABOUR ORGANIZATION CLAUSES OF THE PEACE TREATY

*To the Editor of THE SCOTSMAN, 28 May 1921.*

It appears from the discussion in Parliament reported in your issue of to-day that His Majesty's Government adopt an extraordinary interpretation of the Labour Organization clauses of the peace treaties. These clauses require that any member of the organization shall, not later in any case than eighteen months after the close of a session of the Labour

<sup>1</sup> United States opposition was ultimately bought off by arrangements with American oil interests; see Wright, *Mandates*, pp. 60, 61. It had caused a severe strain in Anglo-American relations.

Conference, bring any recommendation or draft convention 'before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action'. His Majesty's Government apparently hold that it is sufficient that they themselves should study the recommendation or convention, and, if they do not approve it, need not allow Parliament to have any chance of expressing its opinion on the matter.

No one, I presume, will contend that this was the interpretation placed on the clauses by those who persuaded the Government to secure their insertion in the peace treaties. The governmental interpretation, therefore, is contrary to the spirit of the clauses and can be defended, if at all, only on technicalities. But even a technical defence seems impossible. The obligation imposed by the treaty involves the bringing of the matter before the authority or authorities within whose competence the matter lies for the enactment of legislation or other action. His Majesty's Government cannot fulfil this condition by bringing the matter before themselves. They are not the body within whose competence the matter lies, for they cannot legislate, and in refusing to bring the matter before Parliament they were in effect guilty of a breach of the treaty which would have justified any other member bringing the matter before the Permanent Court of International Justice. Their attitude is the more inexcusable since they had obviously good reasons for declining to proceed with the draft conventions in question.

But the question discussed raises once more the issue as to the ratification of treaties without consulting Parliament. The practice has nothing but its antiquity to commend it; it nearly involved the country in the acceptance of the Declaration of London; it is a relic of secret diplomacy, and, if the Government desire to secure the ratification of a treaty which they approve or the rejection of a treaty which they have hastily accepted, they should be prepared to explain the grounds for the proposal to Parliament.

## 8. THE TREATY WITH JAPAN

## REVISION AN OBLIGATION

*To the Editor of THE TIMES, 4 July 1921.*

The explanation of the confusion regarding the Anglo-Japanese Treaty communicated to the Press through Reuter only adds to the deepness of the misunderstandings which seem to assail this Convention. The explanation ignores the crucial point of the whole matter, the terms of Article 20 of the Covenant of the League of Nations, under which the members of the League 'severally agree that this Covenant is accepted as abrogating all obligations or understandings *inter se* which are inconsistent with the terms thereof', and undertake to take 'immediate steps' to procure their release from any obligations inconsistent with the terms of the Covenant which they may have undertaken before becoming members of the League.

That the Anglo-Japanese Treaty of 1911 is not wholly in accord with the League Covenant is admitted in the notes sent last year to the League of Nations, and both the United Kingdom and Japan are under the obligation of revising the terms of the treaty to make it fit the Covenant. Hence it is hardly surprising that the intimation of last year was regarded by the Law Officers and by the public generally as an intimation that the treaty would only be continued in being after July 13, 1921, if it were revised and adapted to meet the new conditions created by the League Covenant. Nevertheless, it is equally obvious that on a mere technical construction of the action taken last year it is perfectly possible to maintain that the treaty was not formally denounced, and that therefore it remains in operation until the necessary year's notice of termination is given.<sup>1</sup>

<sup>1</sup> The treaty was allowed to lapse on the adoption at the Washington Conference of 1921-2 of comprehensive arrangements for limitation of naval armaments (Feb. 6, 1922) and the conclusion between the British Empire, France, Japan, and the United States, of a convention for the preservation of the general peace and the maintenance of their rights in relation to their insular possessions and dominions in the region of the Pacific Ocean (Dec. 13, 1921).

One thing, however, is clear: the Powers concerned are under an absolute obligation to revise the terms of the treaty if it continues in force, and the step should immediately be taken of giving twelve months' notice of the termination of the treaty, on the understanding that during this period efforts will be made to conclude a further treaty. The difficulty regarding the Dominions is obvious, but the precedent of the Treaty of June 28, 1919, regarding assistance to France in the event of German aggression, suggests that it can best be disposed of by a provision that the terms of the new treaty shall not be applicable to the Dominions unless accepted by the Dominion Parliaments. The idea of submitting the issue of acceptance to referenda will not commend itself to any student of the Commonwealth military service referenda.

#### 9. LORD LLOYD'S RESIGNATION

*To the Editor of THE SCOTSMAN, 25 July 1929.*

There is one point which it may be hoped<sup>1</sup> will be elucidated in the discussion regarding the resignation of Lord Lloyd. While Canada has rather markedly expressed the desire to remain disinterested in negotiations affecting the position of Egypt, it is a matter of deep concern to the Commonwealth of Australia and New Zealand, as Mr. W. M. Hughes has recently reminded us, and British policy in regard to Egypt should as far as possible be framed in consultation with the Dominions. Doubtless in the ultimate issue, if there is divergence of view, the British opinion must prevail, because the United Kingdom alone bears the burden of carrying out Imperial policy in regard to Egypt, and Mr. Hughes's views of the correct course of action at the present day would certainly not commend themselves to the present or probably the late Government of this country. But consultation and the fullest consideration of Dominion views when offered are essential, and it would be satisfactory to learn that this is adequately appreciated by the

<sup>1</sup> The hope was not fulfilled, and the discussion was confused and unsatisfactory; see Lord Lloyd, *Egypt since Cromer*.

Ministry. It will be remembered that as recently as February Mr. Mackenzie King made some quite justified comments on the fact that foreign countries were informed of the outcome of the Anglo-French conversations on naval disarmament before the Secretary of State for Dominion Affairs communicated the information to the Dominion.

## 10. THE PROPOSED TREATY WITH EGYPT

*To the Editor of THE SCOTSMAN, 7 August 1929.*

The proposed treaty with Egypt certainly offers the Egyptian people a singularly favourable opportunity of a lasting settlement and of the return to normal of internal government. From the Imperial point of view the treaty presents the unfortunate feature that it is expressed to be applicable to the United Kingdom and not to the Dominions as well. The ground of this restriction is doubtless primarily the attitude of Canada, but there seems to be every reason why, before the matter is finally adjusted, the Dominions should be asked to accept the treaty and to allow the Empire to act as a unit in such a matter. It is true that the Dominions were excluded from the application of the Locarno Pact, unless their Governments decided to accept the obligations imposed by it; but it is to be hoped that that case is not to be treated as the normal method of procedure, but that united action, as in the case of the Treaty of Paris for the renunciation<sup>1</sup> of war, may be assumed to be proper, unless very serious grounds for isolated action can be adduced. The treaty with Egypt cannot be treated as on the same level of importance as that with Iraq; it vitally concerns the Commonwealth and New Zealand, and those Dominions at least should associate themselves with it, and should join with the United Kingdom in asking Canada also to associate herself with the policy involved. The active assertion by that Dominion as member of the Council of the League of her concern with European minorities is surely

<sup>1</sup> See *Speeches and Documents on the British Dominions, 1918-1931*, pp. 398-409.

quite inconsistent with an attitude of disinterestedness in a treaty which ought to be of the highest Imperial value. Nor, of course, can any Dominion be said to be unaffected by such a treaty, which not only creates an alliance but renounces eventually British jurisdiction in Egypt, not only in respect of British subjects in the United Kingdom, but in respect of Dominion British subjects.

## II. THE EGYPTIAN SITUATION

*To the Editor of THE SCOTSMAN, 17 July 1930.*

Is not the essential question in the matter of Egypt the issue whether the King has any claim to British intervention in his interests? British responsibility for the safety of foreigners is necessarily involved when anything in the nature of organized opposition to the Egyptian Government occurs, and this responsibility gives the British Government a clear right to demand that any Egyptian Government shall respect the constitution, which was definitely adopted with its approval. Under the Constitution promulgated in 1923 it seems to be impossible to find any excuse for the King's position. The Constitution deliberately places the ultimate sovereignty in the hands of the people, and provides carefully for constitutional monarchy. The Chamber of Deputies is given express power to secure the resignation of a Ministry by a vote of no confidence; it is authorized to impeach Ministers; and, while the King can declare martial law, he must immediately obtain parliamentary sanction for such action. It is, in fact, perfectly clear that the Constitution aims at full responsible government. The Constitution cannot under any pretext be suspended, except temporarily in time of war or of a declaration of martial law, and in any case the meeting of Parliament as laid down in the Constitution cannot be interrupted. Moreover, from the general power to alter the Constitution there is excluded any change in the representative and parliamentary character of the Government.

It appears, therefore, that the King's resistance to the proposals of his Ministers for further legislation to strengthen the securities for constitutional government is wholly unwarranted, and entirely contrary to the spirit of the Constitution. No British interest can be served by supporting claims so unfounded, and still more improper would be any countenance of tampering with the electoral law. After all, the record of personal rule in Egypt has been one of unrelieved failure, and it is difficult to suppose that any Egyptian Ministry could manage affairs worse than a king acting in defiance of the verdict of the electors.<sup>1</sup>

## 12. THE PALESTINE MANDATE

*To the Editor of THE SCOTSMAN, 24 October 1930.*

The vehemence of Zionist protests against British policy in Palestine obscures the case which the Arabs have against the terms of the Mandate. They contend that to compel any country to receive immigrants is in itself unjust; that it contradicts the principle of self-determination, which was alleged to be the basis of the peace settlement; that it runs counter to the assurances on the strength of which the Arabs co-operated against the Turks; and that the Mandate is irreconcilable with the terms of Article 22 of the Covenant of the League of Nations. On any impartial view their case is strong, and it is possible that the wisest course for a British Government would now be to admit that the policy of 1917 was as unjustifiable as the reparation clauses of the peace settlement, and must, like those clauses, be modified in accordance with the principles of justice and equity.

As so bold a course would raise grave difficulties, the present Government can hardly be blamed for making one more effort to carry out the Mandate, despite the fundamental incoherence of its double purpose. An impartial report has proved

<sup>1</sup> The King's management of affairs resulted by 1934 in a position so unsatisfactory that British advice had to be tendered and a new Ministry appointed which revoked the Constitution of 1930 illegally enacted by the King (Nov. 30, 1934).



that under existing conditions Jewish immigration can be carried out only at the cost of further depressing the unhappy lot of the fellahin. It has shown that steps are possible which by improving methods of cultivation will benefit the fellahin and open the way to fresh immigration. Surely efforts along these lines should commend themselves to every one with any sense of impartiality, and should have evoked the cordial support of Zionists instead of threats 'to circumvent the proposed measures' and energetic efforts to turn the issue into one of party politics.

The present position proves the remarkable folly of the Arabs in refusing to take advantage of the Constitution offered in 1922, which would have given them a legitimate opportunity to represent the just claims of the Arab people under the terms of the Mandate itself and to prevent the rash efforts to hasten unduly Jewish migration, whence has sprung the present unsatisfactory economic condition of the territory. It may be hoped that so grave an error will not now be repeated.

### 13. THE OPTIONAL CLAUSE AND NEUTRALITY

*To the Editor of THE SCOTSMAN, 25 January 1930.*

It is clearly impossible to justify the doctrine that 'as between members of the League there can be no neutral rights, because there can be no neutrals'. The League Covenant limited considerably the possibility of any member's being engaged in a war in circumstances permitting of neutrality on the part of other members, but it did not exclude such a contingency. Nor does the Kellogg Pact by itself fill in the gap. It is as yet unrelated to the Covenant, and includes no sanctions of its own. Hence in those cases in which a member of the League can still go to war without placing itself in a condition of hostility with other members of the League, the fact that in doing so it may violate the Kellogg Pact does not alter the legal position nor take away the right of members to remain neutral. There is, of course, the further ambiguity of the Pact, made sufficiently

clear by the British interpretation, which is by no means generally accepted as correct. Something may be done to alter the position by the proposed amendments of the League Covenant to extend its operation in view of the Pact, but the process of amendment is extremely slow, and, unless and until it is carried out completely in an effective form, it is dangerous to give currency to the doctrine that neutrality is already abolished by the League Covenant.

Fortunately the limited duration of the acceptance of the Optional Clause affords a valuable safeguard, taken in conjunction with its limitation to future disputes arising out of future events, and the policy of acceptance might well have been justified rather as an experiment than on any other ground.

#### 14. PERSIA AND THE OIL CONCESSION

*To the Editor of THE SCOTSMAN, 6 December 1932.*

Russian opinion is doubtless correct in ascribing to the success of the U.S.S.R. in repudiating its obligations the action taken by the Persian Government in respect of the D'Arcy Concession. It was, in fact, a most serious error of judgement when the British Government deliberately permitted the sale in this country of confiscated property and prevented its lawful owners prior to the confiscation from asserting their claims. To refuse to Persia which has been conceded to the U.S.S.R. is a singularly difficult step to take.

It is obvious, of course, that it is impossible to claim that any country is irrevocably bound by a concession made by a previous Government. What the British Government can claim is that, if the concession is to be revoked in the public interest, just compensation should be given to the persons affected by the loss. But the assessment of compensation in such a case is a matter of infinite difficulty, and the obvious solution is to accept the proposal of the Persian Government for friendly negotiation, with a view to assign to Persia a much more

substantial portion of the profits which are being derived from the concession. The British Government presumably intends to follow this course, which it seems should have been taken earlier, so as to avoid the ill feeling which has been engendered on either side over the issue.

### 15. PERSIA AND THE OIL CONCESSION

*To the Editor of THE SCOTSMAN, 9 December 1932.*

Hard cases make bad law, and this, I think, must be the explanation of the remarkable doctrine of the British Government that the unilateral cancellation of a concession held by a British subject is a clear breach of international law. A contract between a foreign Government and a British subject is not a treaty, and the position which arises when it is broken is precisely the same as when a foreign Government defaults on a loan. The British Government may take up the matter, and may urge that compensation should be granted for the cancellation of the contract. Whether refusal to grant compensation would constitute a breach of international law is uncertain. Creditor States have maintained that it would; debtors that it would not; and what the Permanent Court would decide is uncertain. But it must be pointed out that the Persian Government has not refused to negotiate a new contract. It has, instead, expressed itself as ready to consider new terms, and the large distributions of profits made by the Anglo-Persian Company have inevitably convinced Persians that the concession was improvident, and that in equity revision is essential.

The British Government, when it accepted in certain cases compulsory reference to the Permanent Court, limited its acceptance to disputes arising after the ratification of its declaration with regard to situations or facts subsequent to the said ratification. What that means no one has ever been able to say with precision; but it does not seem to me that Persia would find it difficult to insist that the present question is not included in the type of matters on which the British Govern-

ment was prepared to accept the jurisdiction of the Court. The case, in fact, is clearly one, not for strong language which cannot be followed by effective action, but for conciliation and friendly adjustment.

## 16. PERSIA AND THE OIL CONCESSION

*To the Editor of THE SCOTSMAN, 14 December 1932.*

The Persian Government has undoubtedly juridically a very strong case as compared with that of the British Government. It is perfectly clear that it is not a breach of international law for a Government to cancel by a sovereign act any contract made with an alien; if the British Government had desired to convert the matter into a treaty it could no doubt have done so when it was in close relations with Persia. A company whose contract is cancelled ought to be given the right to appeal to a local Court to decide whether the Government is bound to provide compensation. If such right exists, then it must exercise the right before asking the intervention of the British Government. If the right exists and the Court gives a palpably unfair decision, it can also appeal. If no right exists, or the Court is unfair, the British Government in either event can then make representations to the foreign Government.

Is there, then, any obligation on the foreign Government to arbitrate? The answer is very doubtful. Persia evidently is prepared to argue that the issue is a matter which falls exclusively within domestic jurisdiction, and the British Government itself, when accepting the compulsory jurisdiction of the Court, excepted such issues from its competence. The British Courts in the case of Russia have refused to assume that confiscation by a sovereign Government is a breach of international law, and the British Government has, in fact, acquiesced in Russian confiscation of private property and repudiation of debts due to the British Government. The only course really open to the British Government was conciliation and good offices, and it seems to me that, in the circumstances,

Persia has good ground for resenting the tone of the British representations, which appear to have gone far beyond the rights of that Government under international law. Nor frankly, so far as the information available to the public goes, is it at all clear that the Company has not so acted as to afford just ground for complaint on the part of Persia. It may be hoped that the League Council may be able by conciliation to secure a resumption of negotiations and a satisfactory settlement of a mismanaged episode.

### 17. PERSIA AND THE OIL CONCESSION

*To the Editor of THE SCOTSMAN, 20 December 1932.*

It is fortunate that the British Government has invoked the aid of the League Council in the matter of the Persia oil concession. It was quite impossible to expect the Permanent Court of International Justice to accept for a moment the doctrine that it is contrary to international law for a Sovereign State to cancel a concession to a foreign company or individual, when it is found that the concession is inimical to the national welfare. To put the matter at the highest, all that could be claimed would be that, if cancellation took place, compensation was necessary, and Persia, by her insistence on her readiness to consider in principle a new concession, could not be said to be in default, unless and until her action has proved her attitude insincere. Even then it is impossible to say what the Court would have held, and it is certain that compensation would have been far less valuable to the Empire than the renewal of the concession on equitable terms, which we may hope as the outcome of the intervention of the Council. Though the Mavromattis Concession claim against Palestine was entertained by the Permanent Court, that was expressly on the basis of the terms of the mandate, not under international law in general; even so, the Court gave Greece minimal satisfaction, and Lord Finlay's dissenting dicta hardly support the present attitude of the British Government.

We must, I think, cease to regard Persia as a semi-vassal State, and respect her independence as much as we respect that of the U.S.S.R. Our Government, whether under Conservative or Labour control, has recognized that State, despite its complete repudiation of international obligations, and its wholesale confiscation of British property and cancellation of concessions. It has declined to forbid the importation of property confiscated from British subjects; it has permitted the Soviet Government to ignore the arbitral award made in favour of a British company under an agreement entered into by the Soviet Government itself; the Courts are committed to the doctrine that acts of a Sovereign State within its territories are binding on them. It is impossible for us to go to war with Persia on such an issue, and our experiences with the Irish Free State suggest that tariff warfare is singularly unprofitable. Common sense, therefore, dictates reasonable accommodation, and that clearly means a fuller share to Persia in the remarkable prosperity derived from her oil supplies, so that the partnership may be heartily appreciated in that country.

#### 18. THE PERSIAN OIL DISPUTE

*To the Editor of THE SCOTSMAN, 27 December 1932.*

As some misconception appears still to exist regarding the dispute with Persia on the oil concession, may I stress the following points?

(1) The issue is not *sub judice*. Persia, in the exercise of a clear right, has declined to submit it to the Permanent Court, and very wisely the matter is now, unless disposed of by agreement, to be dealt with by the conciliation procedure of the League Council. That is based on broad grounds of international comity, and we have a reasonable ground for hope that the dispute will be adjusted on the only really sound basis, the renewal of the concession under conditions adapted to secure Persia a fairer share in the profits derived from the development of her resources.

(2) It is useless to seek accurate statements of international law in the briefs presented by either party to a dispute. Claimants must put their cases as high as possible, and it rests with Courts to reduce to due proportions the propositions put forward by either side. The celerity of the British adoption of reference to the Council suggests inevitably that the British Government is well aware of the extreme divergence of views among nations as to State responsibility, a divergence which recently has rendered it impossible to codify the law on the topic. All precedent suggests that little prospect of a useful outcome from the Permanent Court existed.

(3) It is useless to ignore the grave effect on our position as regards Persia of our attitude towards Russia. There was no question of choosing between acquiescence in Russian confiscations and hostilities. It was perfectly open to us to adopt the course faithfully followed by the United States, and to refuse to recognize the Russian Government so long as it refused to pay compensation for its confiscations. It was also open to us to refuse to permit the sale in this country of property confiscated by the Russian Government. As we took neither step, we must be held to have acquiesced in confiscation, and this conclusion is rendered inevitable by our willingness to enter into treaty engagements with that Power on as favourable a basis as with any other foreign State. To suggest that there is one rule of international law to be applied to States which we cannot coerce, and another applicable to those which can be coerced appears to me unsound both in law and morality.

### 19. THE PERSIAN OIL DISPUTE

*To the Editor of THE SCOTSMAN, 31 December 1932.*

It is singularly unwise to accept tendencious rumours whether emanating from Teheran or Geneva. (1) That the Shah, who went to the trouble of securing the approval of the Medjliss for the cancellation of the oil contract, should

immediately have stultified himself by dismissing the Minister responsible was *ex facie* absurd. The idle canard has been destroyed by revelation of the fact that the Minister in question was never consulted as to cancellation. Far more serious is the suggestion that representatives of the Powers with seats on the League Council have suggested at Teheran that Persia's case is not strong enough to gain the support of a majority of the Council. The Council has deliberately given Persia the power to present her case by a delegation, and for any member of the Council to form an opinion on the merits of the dispute before that delegation presents its case would be a most discreditable and indeed incredible proceeding. It would show that where a non-European Power was concerned no fairness could be expected from the League, and Japan would resent such pre-judgement of the case as bitterly as would Persia.

(2) It is idle to think that international law is not made by the facts of international relations. The fact that the Powers of Europe have permitted the U.S.S.R. to repudiate treaties, to confiscate property, and cancel concessions at its will, probably is most unfortunate, but we live in a world of realities, not of paper protests, and it is idle to forget that the British Government in 1920 refused to use its legal and constitutional right to disallow the confiscatory legislation of Queensland despite all pressure brought to bear upon it.<sup>1</sup>

(3) I gather that it is no longer proposed to enter into hostilities or even a tariff war with Persia, and that there is really general agreement in the solution which I ventured to suggest as inevitable, negotiation between Persia and the Company on the basis of the grant of more favourable terms to Persia.<sup>2</sup> I need, therefore, only close my side of this correspondence with an expression of thanks for your courtesy in permitting me to present the unpopular side of an important international issue.

<sup>1</sup> See III, Nos 3-5.

<sup>2</sup> Such terms were arranged in 1933, showing the justice of Persia's claim to greater consideration.



## 20. GERMANS IN SOUTH-WEST AFRICA

*To the Editor of THE TIMES, 29 May 1934.*

While the position of South-West Africa is, as Mr. Stoker points out in your issue of to-day, governed by Article 22 of the League Covenant, it must be remembered that the application of that Article is contained in the Mandate defined by the League Council on December 17, 1920. Article 2 of that instrument expressly provides that:

‘The mandatory shall have full power of administration and legislation over the territory subject to the present mandate as an integral portion of the Union of South Africa, and may apply the laws of the Union of South Africa to the territory, subject to such local modifications as circumstances may require.’

The Legislative Assembly, against the wishes of the German members, has asked for an alteration of the Constitution with the object of the administration of the territory as a fifth province of the Union. This demand appears to be worded so as to fall clearly within the express power conferred by the mandate. The request does not demand annexation to the Union, nor the disregard of the rules as to treatment of native population laid down in the Mandate, and it is natural that the British and Afrikaans-speaking elements of the population should wish the closer association with the Union which treatment as a province would involve.

Nor does it appear that the native population should suffer from the change of régime. The objections of the German elements of the population are natural, but it is fair to remember that, by her assent in 1923 to the naturalization *en masse* of the Germans in South-West Africa, Germany greatly weakened her position, and that the treatment of South-West Africa as a province has already been foreshadowed in the application to that territory of the Union Nationality and Flags Act, 1927.

## 21. SOUTH-WEST AFRICA AND THE MANDATE

*To the Editor of THE TIMES, 5 June 1934.*

May I point out that the view of the Mandate for South-West Africa taken by Mr. Stoker in his letter in your issue of to-day differs essentially from that consistently taken by the Government of the Union of South Africa? The Covenant of the League and the Mandate in his view do not envisage annexation to or incorporation in Union territory, and the Covenant contemplates the national entity of the native races so soon as they emerge from tutelage.

The Union Government would admit that the Mandate does not permit annexation, but it can unquestionably insist that Article 2 of the Mandate expressly gives power to treat the territory 'as an integral portion of the Union of South Africa', and therefore sanctions incorporation, if the Union so desires. But, what is far more important, it would not accept for a moment the suggestion that the Covenant contemplates the emergence of the native races of South-West Africa from tutelage to national entity. In fact, Article 22 of the Covenant draws a very clear distinction between three classes of mandates, and it is only in respect of the first category of mandates, which includes the communities formerly belonging to the Turkish Empire, that national entity is envisaged. South-West Africa falls into the third class of mandates, which 'can be best administered under the laws of the mandatory as integral portions of its territory', subject to safeguards in the interests of the indigenous population. General Smuts would have preferred annexation out and out, but he accepted the compromise which gave him power to treat South-West Africa as an integral part of the Union.

The proposal to give the territory provincial status, therefore, violates no right of the native races; its expediency at the present time is more open to question. German dissent, of course, is based on the claim that the territory should be

granted autonomy, which, with the growth of the German population, would mean German control and possibly later reunion with the Reich.

## 22. SOUTH-WEST AFRICA AND THE MANDATE

*To the Editor of THE TIMES, 11 June 1934.*

As there is involved a vital interest of the Union of South Africa, may I reply to Mr. Stoker's letter in your issue of to-day?

1. I have never suggested that the first two paragraphs of Article 22 of the League Covenant do not apply to 'C' mandates. But these paragraphs say nothing whatever of the 'prospective national entity' of mandates. That is contemplated by paragraph 4 for ex-Turkish communities only, while paragraph 6 provides for the administration of South-West Africa as an 'integral portion' of the territory of the mandatory power.

2. Mr. Stoker holds that the safeguards in the interests of the indigenous population in paragraph 6 refer to the generalities in the first two paragraphs of Article 22. In view of what has just been said, that would not help his case, but in the interest of accuracy it is as well to point out that the reference in paragraph 6 is plainly to the specific safeguards set out in paragraph 5 (which deals with mandates of type 'B', such as Tanganyika), including prohibition of the slave trade, arms traffic, liquor traffic, &c., and these matters are accordingly set out in Articles 3-5 of the Mandate for South-West Africa. How narrowly the safeguards are interpreted is sufficiently shown by the fact that they are not held to include in the case of 'C' mandates provision of equal opportunity for the trade and commerce of other members of the League, though that applies to 'B' mandates.

3. The Covenant and the Mandate alike, therefore, leave it entirely open to the Union Government to accept the proposal for treatment of the territory as a fifth province, nor has

the British Government any possible ground of objection. Whether Germany has any valid reason to complain could be decided under Article 7 of the Mandate by the Permanent Court of International Justice.

### 23. GENERAL SMUTS AND THE TREATY OF VERSAILLES

*To the Editor of THE SCOTSMAN, 13 November 1934.*

General Smuts assures us that fair play and sportsmanship and every standard of private and public life call for frank revision of the terms of the Treaty of Versailles. But the question inevitably arises—How is his assertion to be reconciled with the official actions of the Union Government, whose policy he largely determines? That Government has declared illegal the Nazi organization set up on the German model, and is admittedly anxious to incorporate South-West Africa in the Union as a preliminary to formal annexation. General Smuts surely must realize that the logical application of his views would be the offer to transfer South-West Africa in mandate to Germany, a course to which the League of Nations doubtless would gladly accord assent. To urge others to renounce, while retaining for oneself, the spoils of victory is open to serious criticism.

General Smuts also shows a curious narrowness of outlook in his attitude towards the position of the United Kingdom in regard to Europe and the League of Nations. It is very doubtful if any statesman seriously contemplates turning the League into a military machine, but the purpose of the League is to minimize the chance of war, and the members of the League are under obligations which may involve them in war if they are to honour their obligations. Nor is any useful purpose served by threatening the withdrawal of the Dominions from the League, and claiming that the United Kingdom must follow their lead. Isolation may suit a virtually republican South Africa, but sane political opinion in

Australia and New Zealand recognizes that these Dominions cannot demand British aid in securing their safety from dangers in the Pacific, while repudiating concern for the position of the United Kingdom as regards Europe. The Commonwealth can persist only through mutual consideration; neither the Dominions nor any one of them nor the United Kingdom can dictate the policy of the whole.

#### 24. THE LAW OF NATIONALITY

*To the Editor of THE SCOTSMAN, 12 September 1928.*

It appears from your issue of to-day that it has been ruled at Inverness Sheriff Court that the wife of an American citizen, who herself was not, under the law of the United States, an American citizen, must nevertheless be regarded as an American citizen under British law. It would be rather unfortunate if this were actually the state of the law, but it seems clear that the change made in the law by the British Nationality and Status of Aliens Act, 1914, has been overlooked. That Act provides in s. 10 that 'the wife of a British subject shall be deemed to be a British subject, and the wife of an alien shall be deemed to be an alien'. This provision is a deliberate alteration of that in s. 10 of the Naturalization Act, 1870, which runs: 'A married woman shall be deemed to be a subject of the State of which her husband is for the time being a subject.' Under the Act of 1870 undoubtedly the wife of an American citizen was also an American citizen under British law, a provision then unobjectionable, because under the United States legislation of 1855 the wife would under American law be an American citizen, and the same principle applied to many other foreign countries. But by the time when the Act of 1914 came to be drafted, it was realized that in many cases to maintain the position of 1870 would be to impose on a woman in British law a nationality which she did not really possess, and the wording of the Act of 1914 therefore makes the wife of an American citizen an alien, but

not an American citizen. Since the United States Act of 1922 denying automatic citizenship to women married to American citizens, there are many women who have ceased to possess any nationality, and one may sympathize with a lady compelled to register as possessing a nationality denied her by American law and not conferred on her by British law.

Eventually, no doubt, the position of women in such a case will be regularized by their being permitted under British law to retain British nationality in cases where marriage to an alien does not confer upon them the nationality of the husband.<sup>1</sup> The present position is illogical, and to leave a person stateless is quite unfair.

## 25. DIPLOMATIC PRIVILEGE

*To the Editor of THE TIMES, 17 July 1934.*

Sir John Simon's reply to Mr. Somerville's inquiry as to diplomatic privilege in respect of motor accidents suggests that the time has come for the reconsideration of the extent and character of the immunity to be accorded. The fact that foreign diplomats are generally insured against third-party risks is of minimal value to the victim of an accident if he is unable by taking proceedings to establish liability. Diplomatic privilege of course was developed at a time when many modern conditions were not contemplated. It has already proved impossible to maintain it unaltered in the case of government trading,<sup>2</sup> and it is plainly indefensible that it should be available to any attaché on a holiday expedition. The obvious solution is the adoption of an agreement that diplomats shall be instructed by their Governments to waive the privilege except in respect of official actions proper. There

<sup>1</sup> Only carried out in 1933 (23 & 24 Geo. V, c. 49, s. 1). Registration, however, had been excused for a short time before this Act as a result of representations to the Home Secretary.

<sup>2</sup> The U.S.S.R. waived it in its commercial agreements with the United Kingdom; see Art. 5 (7) of the agreement of Feb. 16, 1934. Other projects are still imperfect. Cf. Dicey and Keith, *Conflict of Laws* (ed. 5), p. 194.

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is abundant precedent for waiver,<sup>1</sup> and the only way to preserve intact diplomatic privilege in those cases in which it matters is to exclude its application in irrelevant issues.

## 26. IF SEADROMES COME

### SOME DIFFICULT PROBLEMS IN INTERNATIONAL LAW

*To the Editor of the* MANCHESTER GUARDIAN, 20 November 1934.

The proposed use of seadromes in the transatlantic air service, referred to in your columns to-day, suggests new problems of various kinds to test the ingenuity of students of international law. Nothing precisely similar has so far come under the consideration of lawyers, and the issues which arise must therefore be determined, so far as that is practicable, by reference to analogies and conclusions based on probable reasoning. Fortunately international law has, even more than English common law, the power of adaptation to fresh emergencies.

It is clear that the stationing of seadromes on the open sea involves to some slight extent interference with the paramount principle of the right of navigation, but the degree of interference and the advantage to be derived are of such a character as to render objection on this score negligible. The seadromes would obviously claim to be assimilated to vessels at anchor, and their national status would be determined by the flag which they were allowed to fly. It may be taken for granted that a seadrome owned by a British firm which complied with the principles of the Merchant Shipping Acts would be authorized to fly the British flag, and other nations would doubtless apply like principles. It may, however, be suggested that, as anchored, seadromes might claim assimilation to lighthouses and thus a right might be asserted to claim that the surrounding sea within the three-mile limit was territo-

<sup>1</sup> *Dickinson v. Del Solar*, [1930] 1 K.B. 376.

rial.<sup>1</sup> Such a claim, however, even if valid for lighthouses, could not be maintained. The seadrome would be in no better position than a lightship, and the German destruction of British and neutral vessels near the Nantucket Lightship in October 1916 has never been ruled contrary to international law.

In time of peace it may be assumed the chief issue which might arise would be whether a vessel which injured the aerodrome or its anchor could be held liable for damage. In the case of submarine cables the difficulty had to be disposed of by international agreement in 1884, whence it may be assumed that, without such agreement, injury inflicted on cables would have given no right to damages against the offending ship. It seems, however, that, regarding the seadrome as an anchored ship, the matter might be covered rather by the law affecting collisions at sea, but the question is not free from doubt, and the need of a convention is obvious.

In case of war it can hardly be doubted that belligerent Powers would assert the fullest rights of belligerency against the seadromes and would seize or destroy all those owned by the enemy. It is true that it has never been definitely settled whether a belligerent may cut a cable connecting an enemy with a neutral in the open sea. The view of the Institute of International Law in 1902 negatived the right except in the case of an effective blockade, but the belligerent Powers in 1914 promptly cut nearly every cable connecting Germany with other Powers. It is true also that it has never been formally decided whether enemy-owned cables are lawful prize. But it can hardly be doubted that seadromes would be assimilated to ships for this purpose.

Neutral seadromes present a very difficult problem, for which the simplest solution would be to rule that they could be occupied so as to prevent communication with a belligerent within the limits of a legitimate blockade. But the utter uncertainty as to those limits in view of the doctrines of the

<sup>1</sup> See Wheaton, *International Law* (ed. Keith), i. 367.



last war leaves the matter in the utmost doubt, and makes it clear that a convention is urgently necessary to regulate the position in the event of war as of peace. But it must frankly be admitted that the difficulty of achieving agreement regarding cables would be greatly increased in the case of seadromes.

# THE CONFLICT OF LAWS

## I. INDIAN DIVORCES

*To the Editor of THE TIMES, 24 February 1921.*

The question discussed in your issue to-day of the validity of Indian divorces not based on domicile<sup>1</sup> is one affecting directly the Dominions no less than India. Certain Dominion Acts, especially those of the Australian States and of New Zealand, authorize the Courts to grant divorces to deserted wives, whose husbands have changed their domicile, as the only practical means of alleviating the unjust position of these women. The English Courts have not accepted definitely this doctrine, though it has been supported by judicial dicta. If now the strict rule of domicile is laid down, as on theoretical grounds may be strongly urged, these Dominion divorces will be invalid in England, and parties thus divorced may be guilty of bigamy if they remarry.

It is probable that the matter will require adjustment by Imperial legislation passed with the occurrence of the Dominions in the method now usual. There is, of course, a precedent for the recognition of divorces based on mere residence in the Matrimonial Causes (Dominion Troops) Act, 1919, which, however, was of temporary duration.

## 2. INDIAN AND COLONIAL DIVORCES

*To the Editor of THE TIMES, 27 April 1926.*

It may be regretted that the authority of the Privy Council, which has so recently and so convincingly defended the principle that divorce jurisdiction should rest on domicile,<sup>2</sup> has not deterred the Secretaries of State for India and for Dominion Affairs from deciding on the introduction of the Indian

<sup>1</sup> See *Keyes v. Keyes*, [1921] P. 204; Dicey and Keith, *Conflict of Laws* (ed. 5), pp. 944-6; *Responsible Government* (ed. 2), ii. 963, 964.

<sup>2</sup> *Attorney-General for Alberta v. Cook*, [1926] A.C. 644.

and Colonial Divorce Jurisdiction Bill. But assuming that cases of hardship in India are sufficient to justify the new measure, there are certain matters in which alteration in the Bill before it becomes law appears desirable.

In the first place, it must be regarded as very doubtful whether it is necessary to include provision for the application of the measure to other parts of the Empire, excluding the self-governing Dominions. But, assuming that this is justifiable, it is impossible to see any ground for not giving the Dominions power to adopt the Act if they should so desire. It cannot seriously be contended that New Zealand would misuse a right conceded in India, and no constitutional objection exists to giving power to the Dominions to secure the advantage of Imperial legislation. Secondly, the Bill proposes to make binding on the English and Scottish Courts the findings of Indian Courts as to the question whether persons over whom they exercise divorce jurisdiction were domiciled in England or Scotland. This is a novel and undesirable position. It is settled law that a decision—e.g. of the Court of Session—can be impeached in England if it was obtained by fraud,<sup>1</sup> and it does not appear that any Indian Court possesses superior status to that of the Court of Session. It would, it is clear, be proper to limit the binding effect of any decision of an Indian Court to India itself. Thirdly, as the whole scheme of the measure is based on making Indian Courts auxiliaries to the English or Scottish Courts, it is illogical to restrict the exercise of jurisdiction in cases of persons domiciled in Scotland to the grounds of divorce recognized in England. Divorce on the ground of desertion is surely just the case in which the jurisdiction of the Indian Courts might most appropriately be exercised.

### 3. DIVORCE LAWS WITHIN THE EMPIRE

*To the Editor of THE SCOTSMAN, 10 August 1932.*

Continental disagreement, even between States which base

<sup>1</sup> See *Bonaparte v. Bonaparte*, [1892] P. 402.

divorce jurisdiction on nationality, renders any probability of an international convention acceptable to England or Scotland negligible. But there is an inter-Imperial reform which is overdue. By the Indian and Colonial Divorce Jurisdiction Act, 1926, it was made possible for persons domiciled in England or in Scotland, but resident in India, to be divorced by Indian Courts on conditions which ensured due care. The statute was made capable of application to the Colonies. I suggested in your columns that it should be made possible of application to any Dominion or State which desired to have this done, but, probably because the whole matter was experimental, the proposal was finally not adopted.

Experience has proved the value of the plan. It has been extended to Kenya, to Jamaica, and the Straits Settlements. The time is surely ripe for reconsideration of the decision of 1926, and for the offer to be made to the Dominions and States to accord to them on such terms as may prove acceptable the privilege given to the Colonies and India.<sup>1</sup> If some measure of reciprocity is asked for, it might well be conceded. As matters stand, New Zealand has been compelled to adopt the plan of granting divorces to New Zealand girls who have married persons domiciled in England by suit in the New Zealand Courts in certain conditions. Such divorces are of no legal validity in any other part of the Empire, and are anomalous and unsatisfactory. Under modern conditions of inter-Imperial relations it ought not to prove difficult to adjust the matter within the Empire.

#### 4. INDIAN-SCOTTISH MARRIAGE CASE

*To the Editor of THE SCOTSMAN, 19 December 1928.*

Two points of great interest are suggested by the decision of Lord Mackay in the case of *Lendrum v. Chakravarti*<sup>2</sup> reported in your issue of to-day.

<sup>1</sup> No action has yet been taken in this sense

<sup>2</sup> [1929] Sc. L.T. 96. See Dicey and Keith, *op cit.*, p. 929.

(1) As Lord Mackay held that the pursuer was domiciled in India at the date of proof, it is clear that he does not share the opinion apparently expressed by Lord Phillimore in *von Lorang's* case<sup>1</sup> that no court save that of the domicile of the parties has power to make a decree of nullity of marriage. Lord Mackay's view maintains harmony between English and Scottish law, for it is clear that the former permits authority to English Courts to pronounce on the nullity of any marriage celebrated in England.

(2) On the other hand, Lord Mackay's view of Scottish law as permitting a grant of a decree of nullity in the circumstances renders Scottish law quite different from English law in this regard. Even if the defender were shown in an English Court to have induced marriage under a misrepresentation as to the validity in the place of his domicile, it is clear that a marriage otherwise valid in England could not be invalidated on this score. Lord Mackay's decision of course is not confined to Indian marriages,<sup>2</sup> and it means that, even where a husband innocently induces a marriage, thinking that it will be valid in his country of domicile, that marriage will be declared null if it turns out that it is not valid in that country, at any rate if the spouses are to live there. It appears to me that the English law is distinctly preferable in this regard, and I note that Lord Mackay's decision was not arrived at without hesitation, and that, moreover, it was given in an undefended case.

<sup>1</sup> *Salvesen v. Administrator of Austrian Property*, [1927] A.C. 641.

<sup>2</sup> All such marriages, and they are not rare, could probably be declared null on the grounds accepted in this case. It is dubious if it will be followed.

VI  
EPILOGUE  
DOMINION STATUS IN 1935



## DOMINION STATUS IN 1935

### I. BRITAIN AND THE FREE STATE

*To the Editor of THE SCOTSMAN, 4 January 1935.*

Mr. de Valera has indeed every reason to be pleased that at a critical moment in his fortunes the conclusion of the commercial understanding with the British Government has rehabilitated his prestige and re-established his position in the Free State.<sup>1</sup> The British Government, he may justly feel, has proved the hollowness of its denunciations<sup>2</sup> of his bold stroke in severing in Irish law the bond of allegiance to the Crown by accepting simultaneously a measure which has hopelessly weakened the elements of opposition to his régime in the Free State.

It seems to me that the prediction I made in a letter to you of April 10, 1922,<sup>3</sup> has come true, and that in an economic struggle the honours have come to rest with the Free State. As Mr. Churchill's prediction then, that by economic warfare the Free State could be maintained in subordination, has proved incorrect, has not the time really come for the British Government and the British public seriously to face the question whether they should not accept the possibility of permitting within the British Commonwealth of Nations a Constitution frankly Republican? If the United Kingdom were prepared to make such a concession, it would be interesting to see whether the Free State would reject it on the score that Northern Ireland must be included in the Republican area. But, at any rate, is it not time to drop ineffective and unreal protests against Mr. de Valera's legislation? They merely diminish British prestige, and, when accompanied by secret commercial negotiations of the kind now concluded,

<sup>1</sup> A large increase in exports of Irish cattle was permitted in return for the acceptance of British coal (*The Scotsman*, 4 Jan. 1935).

<sup>2</sup> See I, Nos. 102-5.

<sup>3</sup> See I, No. 23.



must induce in the Free State a profound disbelief in the seriousness of the British objections to Irish action.

## 2. WESTERN AUSTRALIA AND SECESSION

*To the Editor of THE SCOTSMAN, 1 February 1935.*

It is most unfortunate that the formal procedure regarding the petition from Western Australia for the right to secede from the Commonwealth should apparently be misinterpreted in Australia as suggesting that the British Government and Parliament are proposing to sit in judgement on the merits of the case. Such a course would be utterly unconstitutional, and it is regrettable that any idea of such a possibility should be allowed to exist.<sup>1</sup>

All that is to be decided by the Joint Select Committee, whose appointment Lord Hailsham proposed yesterday, is the formal question, Is the petition one which is proper to be received by the Houses of Parliament on the score that it relates to a matter within their competence, and is otherwise in order? The case on this formal issue is quite different from that on the merits. It is argued for the State that the Imperial Parliament still is fully sovereign, and still can legislate to override the Commonwealth Constitution which was granted by an Imperial Act. Accordingly the petition of Western Australia deals with a matter within its legal competence, and should be considered as entitled to formal reception, despite the patent impossibility of giving effect to it. On the other hand, it is argued that it is erroneous to treat the matter as one of formal legality; granted that the Imperial Parliament could legislate to destroy the Commonwealth, nevertheless such action would be utterly unconstitutional, and a petition asking for action of this type would be wholly improper to be received.

<sup>1</sup> This letter repeats the substance of a communication made at the request of the Australian Newspapers Cable Service.

It is easy to adduce arguments to support either view, but there is no doubt whatever that every consideration of expediency and constitutional propriety, which ranks far above bare legality, tells in favour of a refusal to receive the petition. It is impossible not to regret that Western Australia should have placed both the Crown and Parliament in so embarrassing a position. The precedent of Nova Scotia in 1868 at the very beginning of federation in the Empire should have sufficed to remind the politicians of the State that, having entered an indissoluble federation, they must seek salvation within the Commonwealth. Their case is far inferior to that of Nova Scotia, which was brought into federation without an opportunity of dissent being afforded to the people, whereas Western Australia decided on joining the Commonwealth by a decisive referendum.

### 3. DOMINION FISHERIES AND IMPERIAL DEFENCE

*To the Editor of THE SCOTSMAN, 6 February 1935.*

Perhaps it may be of interest to supplement the decidedly uninformative reply given by Mr. J. H. Thomas to Sir M. McKenzie Wood yesterday regarding the penalty imposed on a Scots fisherman for fishing within three miles of the shore in Lough Swilly.

The origin of this discrimination between classes of British vessels is to be traced to the agreement regarding Commonwealth merchant shipping negotiated and signed by Mr. Thomas on December 10, 1931. That agreement expressly derogated from the rule that legislation in any part of the British Commonwealth should be based on a régime of equality towards all British shipping, wherever registered, by providing by Article 12 that 'nothing in the present agreement shall be deemed to restrict the right of each part of the Commonwealth . . . to regulate the sea fisheries of that part.' This

agreement, signed in anticipation of the coming into operation of the Statute of Westminster, 1931, which abrogated the restrictions hitherto binding on Dominion legislatures in matters of shipping under the Merchant Shipping Act, 1894, was deliberately framed in order to permit of exclusion of United Kingdom vessels from the Free State fisheries. Naturally, therefore, when the Sea Fisheries Protection Act, 1933, was passed, the Dominions Secretary could not protest against action which he had deliberately agreed to for His Majesty's Government in 1931.

To many of us, no doubt, the surrender in 1931 on the issue of shipping appeared unnecessary and undesirable in view of the fact that the sea defence of the Commonwealth was still left essentially a burden on the British people, and in return equality of treatment for all British fishing vessels might have been expected. But the Free State has the excuse that defence by sea was withheld from her by the treaty of 1921, and Mr. Pirow,<sup>1</sup> now the official exponent of South Africa's attitude to the Commonwealth, has made it disconcertingly clear how little value is attached to the British fleet, a view to which we must suppose that General Smuts is now a convert. Mr. Pirow's candour is refreshing, but it is a pity that he did not explain whether the difficulties which have arisen regarding acceptance of the request of South-West Africa for inclusion in the Union are connected with the possible return<sup>2</sup> of that territory to Germany, or whether he expects the British Government to surrender control of Tanganyika. And, in the latter event, in view of German rearmament in defiance of treaty, how does he expect to restrain Germany from that use of native forces which so deeply impressed General Smuts from his war experience as a danger of the most serious kind to the Union?

<sup>1</sup> See his address to the Imperial Press Conference, 5 Feb. 1935, which followed on his assertion of hope that Germany would again become an African Colonial Power (*The Scotsman*, 24 Jan. 1935).

<sup>2</sup> See V, No. 23.

## 4. THE GOVERNMENT OF INDIA BILL

*To the Editor of THE SCOTSMAN, 25 January 1935.*

Whatever excuses are available, the failure to mention Dominion status in the preamble to the Government of India Bill is a profound error. It is entirely in keeping with the deliberate efforts made by the Ministry to minimize the significance of Lord Willingdon's reiteration of Lord Irwin's promise, and in view of the precedent of 1919 it is impossible not to expect Indian opinion to regard the omission as indicating that the present Government is out of sympathy with Indian aspirations.

Of the details of the Bill, it is sufficient to point out that a most unfortunate departure from the report of the Joint Committee has been made in refusing to accord to the Federal Court the decision of the effect of federal laws. The failure to grant this power in the White Paper proposals was a serious defect in them, and the fact that the Government has refused to follow the advice of the Committee is deeply regrettable. It is impossible to imagine any valid ground for the attitude adopted.

It is, further, most unfortunate that the Bill is still framed so as to ignore a fundamental principle of responsible government, the rule that it is the right, and indeed in certain circumstances the duty, of the Governor under responsible government in its initial stages to refuse the advice of Ministers if he is satisfied that they do not represent the wishes of the electorate, and that in the event of their resignation in consequence of his refusal he will be able to secure Ministers who will accept responsibility for his action, and obtain the support of the majority of the Lower Chamber—whether with or without a dissolution—for their action. The Bill proceeds on the assumption that the Governor can refuse advice only when he is expressly required under the measure to act in his discretion or to exercise his individual judgement, and thus deprives him even of the legal right to proceed on the usual

principles of responsible government as practised in the self-governing Colonies.<sup>1</sup> On matters entrusted to the Governor's discretion Ministers are deprived by law of the right to tender advice, though these matters include such an issue as that of dissolution, a question normally and properly for Ministerial initiative.

The Bill, like the White Paper, leaves utterly unsatisfactory the power of the Federal Legislature, Executive, and Judiciary over federating States, and, if federation should be effected on the basis of its terms, it will be a federation utterly imperfect, and will result either in dissolution or in a revision in which State rights will be drastically extinguished.

## 5. INDIA AND DOMINION STATUS

*To the Editor of THE SCOTSMAN, 12 February 1935.*

It seems only fair to Lord Irwin to point out that his statement as to Dominion status for India was merely the logical outcome of the decisions taken by Mr. Lloyd George's Government. In August 1917 India was given a promise ultimately of responsible government as an integral part of the British Empire; that phraseology precisely described the status of the Dominions at that time, and that ultimate assimilation to the Dominions was intended was made plain by the fact that in April the Imperial War Conference had decided that India was to be admitted to membership of the Imperial Conference, from which she had been excluded by the constitution laid down for the Conference in 1907, simply because she did not enjoy responsible government. Any doubt, however, as to the intention of the British Government disappeared when Mr. Lloyd George spontaneously decided that India must be given the same status as the Dominions in the League of Nations. That claim was justifiable only on the understanding that India was destined to have precisely the same autonomy in external relations as the Dominions.

<sup>1</sup> See II, No. 25.

Sir Thomas Inskip, I fear, has rather darkened counsel than shed light on the position.

(1) Granted as obvious that Dominion status means nothing apart from the Empire, that does not imply that Dominion status may not involve the right to sever connexion with the Empire, to pass beyond that status to full independence. No value whatever attaches to the argument from phraseology.

(2) Whether the right to advance to full independence is included in Dominion status is disputable. The difficulty in the way of negating it lies in the fact that the Leader of the House of Commons and head of the Conservative party, speaking with the utmost deliberation in the House of Commons on March 30, 1920, declared that Dominion Home Rule implied the right of self-determination and secession. I have been unable to find a single denial of this view by any Cabinet Minister speaking in Parliament with like authority. General Hertzog claimed the right at the Imperial Conference of 1926, and unfortunately, instead of expressly negating it, the Conference in its declaration of status used the term 'freely associated', which is a very different thing from Mr. Baldwin's ideal of 'India, with the rest of the Empire, banded together indissolubly under one British Crown'. The Conference of 1930 seemed to negative secession by unilateral action by providing that alteration in the succession to the Throne should require the assent of the Dominions and the United Kingdom Parliaments, but General Hertzog denied that this provision was intended to negative the right of secession, and both Houses of the Union Parliament accepted the Statute of Westminster expressly on this understanding.

(3) It is misleading to say that the Statute of Westminster did not mention and did not define Dominion status. In fact, it alludes in the preamble to the declaration of that status, and recites that it was enacted to ratify, confirm, and establish *inter alia* the declaration. It is further impossible to agree that 'it is idle to contend that the Statute altered Dominion status at all'. It was passed to give the force of law to that

status by sweeping away all legal restrictions on its exercise; it converted a political theory into constitutional law. Under its terms the Union Parliament has created itself the sole legislative authority in the Union, and has conferred on the Governor-General, selected by the Union Government and removable by it, the power to exercise on the advice of the Union Government every function of external as well as of internal authority. General Hertzog claims that the Parliament can now authorize the Executive to declare the Union neutral in a British war, and can terminate the connexion of the Union with the British Crown. The King's assent to the Status of the Union Act and the Royal Executive Functions and Seals Act of 1934 was given with full knowledge of the meaning placed on these measures by the Prime Minister of the Union and clearly the majority in Parliament, and it will be most interesting to note the reaction of General Hertzog to the Attorney-General's repudiation of the right of secession as inherent in Dominion status, a repudiation which must play directly into the hands of the Republican faction in the Union.

## 6. A DOMINION'S NEUTRALITY

*To the Editor of the MORNING POST, 20 February 1935.*

It is rather disconcerting for his Majesty's Government to find, so soon after the effort of the Attorney-General to negative the view that Dominion status implies the right of secession, that General Hertzog has no doubt as to the right of the Union to remain neutral in a British war, or of Union nationals to trade with His Majesty's enemies. As His Majesty's Government has at no time denied the validity of General Hertzog's claim, we can only suppose that it is not prepared to contend that General Hertzog's view is unsound in view of the passing of the Status of the Union Act of 1934.

But exception must be taken to General Hertzog's contention that the position of Simonstown is analogous to that of Gibraltar. Gibraltar is British territory, held absolutely

independently of Spain, and the Spanish Government owes no obligation to defend Gibraltar or to aid the British Crown in its defence. Spain can remain neutral in a British war, and no Power can question the validity of that neutrality.

But the position as to Simonstown is wholly different. When the British Government by agreement with the Union Government in 1921-2 handed over to the latter control of defence by land, it transferred all War department lands and buildings in which the Admiralty was interested, subject to the reservation that the Admiralty would be secured in the right of perpetual user for naval purposes of all lands and buildings which they then occupied. The Union Government also agreed to undertake responsibility for the Cape peninsula land defences, including those of the naval dockyard at Simonstown as a base and naval fuelling station of the British Navy, and to keep them in a state of defence for Imperial purposes, so that the station would at all times be able to discharge its functions as a naval link in the sea communications of the British Empire.

In view of these facts it is simply impossible to claim that any enemy Power would be under any obligation at international law to respect neutrality if asserted by the Union, and Mr. Pirow showed greater comprehension of international law than does General Hertzog when he admitted that foreign Powers might not respect Union neutrality.

In fact the position of the Union is very like that of the Irish Free State. As Mr. de Valera has frankly admitted, the obligations of the State to the United Kingdom as regards facilities for naval defence are legally incompatible with any claim to be treated as neutral by an enemy.

## 7. THE PRINCES OF INDIA AND FEDERATION

*To the Editor of THE SCOTSMAN, 1 March 1935.*

Such particulars as are here available regarding the demands of the Indian Princes show forcibly how erroneous



have been Sir S. Hoare's tactics in insisting that their accession is essential to the Governmental scheme of Indian reform. He has thus encouraged them to put forward demands which are clearly based on the belief that he will be compelled to make unwise surrenders in order to save his plan from shipwreck.

Nothing is more significant than the criticism of the instrument of accession on the ground that it is not in the form of a bilateral agreement between the States and the Crown, and does not include any covenant on the part of His Majesty preserving inviolate the treaties and agreements concluded with the States. The essence of this project is to place on a completely new basis the relations of the States and the Crown by obtaining from the Crown, in consideration of accession to the federation, the reaffirmation of existing treaties and agreements. The Princes will then be entitled to claim the literal execution of the treaties, and will be able to assert that to apply to them the traditional methods of interpretation of the Government of India would be utterly unjust. It is, of course, well known that many of the existing treaties have long ceased to be applicable to the present position of the Crown, and that the literal meaning has long been discarded by usage. It is the natural, but in the interest of India most dangerous, wish of the Princes as the price of a certain surrender of authority to the federation to secure freedom in future from the interference of the Crown as regards the rest of their sovereignty, which, of course, includes the matters of greatest interest to them. Above all, they are determined to obviate any possibility of the Crown bringing pressure on them to establish some semblance of the rule of law and representative government in their territories.

To weaken in any measure the power of the Crown to protect the interests of the people of the States for the sake of securing accession to federation would be wholly unfair. It is the power of paramountcy which has enabled the Crown to secure at present due administration in Alwar, Dewas (Senior

Branch), and Jhabua, to restore order in Kashmir, to save Indore twice within comparatively recent times from grave misrule, and to preserve British administration over the Berars. When States are still in some cases so backward that here and there one meets cases of what is practically domestic slavery, it is imperative that the Crown should retain its ultimate power of unfettered control in the interest of the State, for the *pax Britannica* forbids the people of any State to rid themselves of an unwanted ruler by revolt.

## 8. SOUTH AFRICA AND APPEALS TO THE PRIVY COUNCIL

*To the Editor of THE SCOTSMAN, 26 February 1935.*

It is easy to sympathize with General Smuts in his criticism of the action of the Privy Council in the case of the *Pearl Assurance Co. v. Government of the Union of South Africa*.<sup>1</sup> The issue involved was a purely technical point of Union law, arising from the difficulty of determining whether a sum named in a contract as payable on breach is a genuine pre-estimate of loss or a penalty, and the Privy Council affirmed the decision of the Supreme Court, but held that the view of the majority of that Court as to the onus of proof was incorrect. Even assuming that the view of the Judicial Committee is more in harmony with Roman Dutch law as developed in the Union than was that of the Court below, it is surely undeniable that it is contrary to public policy that such minutiae should be decided at great cost in London. There is no real answer to the view of General Smuts that the essential justification for retaining the appeal from the Union is the possibility that it might be valuable in the case of a grave constitutional issue, just as in Canada the movement for the abolition of the appeal is held effectively in check by the strong feeling both in Quebec and in the English-speaking provinces that instances may arise in which an impartial

<sup>1</sup> [1934] A.C. 570

tribunal outside the Dominion might be able to render a decision with greater chance of general acceptance.

Unfortunately, the Judicial Committee has never acted upon the view, more than once enunciated on its behalf by Lord Haldane,<sup>1</sup> that its essential function is deciding constitutional issues, where the Dominions are concerned. In the case of the Irish Free State, the bitter contest between the Committee and the Government of the State was initiated by the former granting leave to appeal on what was merely the issue of the correct interpretation of the Irish Free State Land Act, 1923, an action declared by Mr. Kevin O'Higgins to be a very clear and definite departure from the undertakings given to Irish ministers when the draft constitution was under consideration, while recently the dangerous question of the validity of Irish legislation abrogating the appeal has been raised, not on an important constitutional issue, but on a purely technical and very obscure point of statutory interpretation as to fishery rights on the Erne.

It may be hoped that the Union Government will not feel it necessary to follow the example of the Free State and abolish the appeal outright. It would suffice to limit it by Union Act, as full power to do exists, to cases involving the interpretation of the Union Constitution. But the danger is that, if the Union once starts legislation, it may be impossible to avoid abolition *in toto*.

<sup>1</sup> See *Whittaker v. Durban Corporation*, 90 L.J.P.C. 119.

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